United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

065

No. 21,247

FREDERICK O. GAITHER,
Appellant,

v.

CHARLES R. MYERS
and
AMERICAN MOTORIST INSURANCE COMPANY,
A CORPORATION,
Appellees.

APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS

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STATEMENT OF QUESTION INVOLVED

The question presented is that the District of Columbia Court of Appeals erred in reversing the verdict directed by the trial court in favor of the appellant.

INDEX

CITATIONS

STATUTES AND REGULATIONS:

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This case is an action for property damage due to negligence. Jurisdiction of the District of Columbia Court of General Sessions was based upon Title 11, Section 961, D. C. Code, 1967 Edition. After that Court directed a verdict in appellant's favor, an appeal followed. Jurisdiction of the District of Columbia Court of Appeals is based upon Title 11, Section 741, D. C. Code, 1967 Edition. Juris-

diction of this Court is based upon Title 11, Section 321 and Title 17, Section 104, D. C. Code, 1967 Edition.

STATEMENT OF THE CASE

This action for property damages arises out of a motor vehicle collision on the night of June 22, 1960. At that time, appellee, Charles R. Myers, was travelling north on Maryland route No. 4 in his vehicle in which Fred A. Dovholuk was a passenger. The appellee's vehicle was struck from the rear by a vehicle which went off the road to the left and then swerved back to the right side of the road where it came to a stop some 960 feet from point of impact. (JA 16) Although Mr. Myers had only a momentary glimpse of lights in his rear view mirror before impact and never saw the other driver, (JA 33) he did see keys in the ignition following the accident. The search for the other driver was to no avail. (JA 17)

Suit was filed by the appellees (JA 1) a short time prior to the expiration of the statute of limitations and the trial of this matter produced the following testimony:

The defendant, Frederick O. Gaither, was called by the plaintiff as a witness.

Mr. Gaither stated that on the afternoon of June 22, 1960, he had been involved in his work as a landscape contractor with a man who was at that time his employee, Mr. Hendricks. (JA 5, 6) After finishing work, Mr. Gaither gave Mr. Hendricks a ride at least part of the way to his home. (JA 6, 23) He proceeded to park his car in the 2400 block of "L" Street (JA 6) and locked the automobile (as well as the ignition). (JA 8) Mr. Gaither did not remember what he did with the keys after he locked the automobile. (JA 8)

Mr. Gaither testified that he had more tools in his automobile than normal because the particular job on which they were working required carpentry and brick work in addition to the normal land-

scaping. (JA 7) There were normal landscaping tools, postage stamps, umbrellas, topcoats, raincoats, galoshes, expensive electrical tools (JA 7, 8, 25) as well as brief cases. (JA 13-14) Some of these had been put there by the employee Hendricks. (JA 25)

Mr. Gaither went to his home which was very close to the parking place, and never left again that evening until after the accident (JA 8, 9).

The defendant testified that he encountered three people that evening: a school teacher whose name was Bob Miller, an elderly man who lived on the same floor by the name of Mr. Studd, and his employee, William F. Hendricks. (JA 9, 10) Mr. Hendricks had come to the defendant's apartment at approximately 10:00 or 10:30 and left after watching the 11:00 o'clock sports on television. (JA 10)

Counsel for the plaintiffs questioned the defendant as to whether or not he had mentioned coming into contact with these people at the time his deposition was taken. (JA 10, 11, 12) Gaither answered that he could not recall *mentioning* these people, but stated that since the deposition he had had time to think it over and recall everything, (JA 10) and that his memory had been refreshed after discussing the matter with Mr. Hendricks (JA 14) at a time after his deposition. The accident occurred on June 22, 1960, and Gaither's deposition was taken on August 6, 1964, more than four years later.

The defendant retired between 12:00 and 1:00 A.M., and was awakened later by a telephone call from a Prince George's County policeman (JA 12, 13) who notified him that his automobile had been involved in an accident. (JA 12, 13) Gaither denied that anyone was using or driving the car (JA 13) (with his permission).

Mr. Gaither stated that he would go to Prince George's County to recover the car, and he subsequently did so. (JA 13) Arriving at the car, the defendant stated that the tools mentioned earlier as having been placed in his vehicle, a 1958 station wagon, (JA 13) were missing, but that he did recover a briefcase from the policeman. (JA 13)

The defendant stated that he does not have any trouble normally hearing the phone ring, (JA 14) but characterized himself as a heavy sleeper. (JA 13) He did not recall any conversation with police officers wherein he told them what he did with his keys after he locked his automobile. (JA 14)

The plaintiffs then called Corporal James B. Rash of the Prince George's County Police, who stated that he had investigated the accident. (JA 15) Corporal Rash described the accident scene as he found it, and attempted to reconstruct the occurrence of the collision. (JA 15, 16, 17) He stated that the individual plaintiff was on the scene, but that despite a search, the driver of the other vehicle could not be located. (JA 17) Rash stated that he determined the ownership of that other vehicle at approximately 12:30 or 12:45 that evening. (JA 17) He then began attempts to contact the owner, and finally reached him at 3:30 a.m. on June 23, 1960. (JA 18) When asked by counsel for the plaintiffs to estimate the number of times he attempted contact by telephone, Corporal Rash stated, "I don't recall, but I would say a half dozen times." (JA 18)

Officer Rash also testified, "I called the Metropolitan Police Department and asked them if they would make a notification for me that we had this car impounded. Their return was that they were unable to raise anyone at that address." (JA 17)

The police officer recalled that there was some garden equipment and a briefcase in the vehicle, (JA 18) but he did not recall the number of pieces of garden equipment. (JA 20) When asked by the Court if the defendant reclaimed the tools, he answered, "Not that I know of." (JA 20)

Corporal Rash said that the defendant couldn't give him any reason why his car was in Maryland at all, (JA 18) and that in reply to a question by counsel as to whether or not Gaither had left the keys in his vehicle, the police officer stated, "His reply was that

he didn't leave the keys in the vehicle but must have left them in the tailgate when he was locking it." (JA 18, 19)

Rash further testified that the accident occurred at or before 11:25 p.m. (JA 19) at a point which was approximately 4½ to 5 miles from the District of Columbia boundary line at the south east section of Washington, D.C. (JA 19)

The plaintiffs then rested their case. (JA 21) The defendant moved for a directed verdict which was denied with permission to renew it at a later time. (JA 22)

William F. Hendricks was called as a witness on behalf of the defendant, (JA 22) and he identified himself as an employee of Mr. Gaither at the time of the accident, June 22, 1960. (JA 22, 23) He testified that he had worked with Mr. Gaither on that day, and that after work he had stopped by the defendant's apartment a little before 10:00, watched the late news, weather, and sports on television, and left very close to 11:30. (JA 23) Later in the morning, he was called by Mr. Gaither who said that his (Gaither's) car had been taken and wrecked some place in Maryland. (JA 23) Mr. Hendricks borrowed a car and drove Mr. Gaither to the garage in Maryland where the car was being kept by the police. (JA 24) It was Hendricks' testimony that there were *no* tools, *nor anything else* in the back of the station wagon *when they arrived at the car.* (JA 24, 25) Hendricks had put the tools in the back of the vehicle on June 22, 1960. (JA 25)

Mr. Hendricks testified that he has seen Mr. Gaither many times since he left the Washington, D.C. area in 1962, and that Mr. Gaither has visited his home, but he did not testify as to when these visits were paid. (JA 25, 26)

The Court allowed the plaintiffs to call the defendant as a rebuttal witness. (JA 26, 27, 28) On rebuttal, Mr. Gaither testified that he learned of Hendricks' address for the first time after his (Gaither's) deposition had been taken. (JA 29)

The plaintiffs then attempted to introduce into evidence several traffic regulations. Maryland Traffic Regulations, Sections 200, 201, 209, 211, 219 and 221 were not admitted. (JA 30, 31, 32) Maryland Traffic Regulations, Section 224, dealing with one driver following another too closely, was admitted. (JA 33) The Maryland and the District of Columbia Traffic Regulations dealing with leaving a motor vehicle unattended, Section 247 and Section 98 respectively, were refused admittance into evidence. (JA 34, 35, 36)

The defendant's motion for a directed verdict was then renewed, (JA 36) and after argument, the motion was granted. (JA 41)

An appeal to the District of Columbia Court of Appeals by the plaintiffs followed. (JA 4) The District of Columbia Court of Appeals reversed the decision of the trial court and ordered a new trial. (JA 54, 57) The decision to reverse was not unanimous, however. One member of the Court wrote a very strong dissent. (JA 54, 55, 56)

The appellant filed a petition which was granted and this appeal to this Court was the result.

STATEMENT OF POINTS

(1) The District of Columbia Court of Appeals erred in using Section 40-424 of the District of Columbia Code to create a statutory presumption that the operator of appellant's vehicle was the agent of the owner (appellant).

(2) The District of Columbia Court of Appeals erred in holding that the issue of whether the appellant's evidence at trial as to permissive use was impeached was a question for the jury.

(3) The District of Columbia Court of Appeals erred in extending the application of Article XIV, § 98, of the Traffic and Motor Vehicle Regulations of the District of Columbia as to the removal of keys from the ignition of a motor vehicle.

(4) The District of Columbia Court of Appeals erred in not using Maryland law to determine the effect of the intervening actions of a thief of a motor vehicle.

STATUTE AND REGULATION INVOLVED

(1) Section 40 – 424 D.C. Code (1961 Edition)

Whenever any motor vehicle, after the passage of this chapter, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner.

(2) Art. XIV, Section 98, Traffic and Motor Vehicle Regulations of the District of Columbia

No person driving, or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway.

SUMMARY OF ARGUMENT

I

The use of Section 40 - 424 of the District of Columbia Code by the District of Columbia Court of Appeals was error. That Court apparently attempted to apply the presumption of permissive use in Section 40 - 424 as a rule of evidence in a case involving an automobile accident in Maryland. That section, however, only applies to motor vehicle accidents occurring in the District of Columbia and cannot

create a prima facie case for a plaintiff who is suing as the result of a Maryland accident.

II

The District of Columbia Court of Appeals erroneously reversed the decision of the trial judge when he ruled that the appellant's evidence at trial as to permissive use was uncontradicted, unimpeached and not for the jury. A close reading of the evidence will reveal that as a matter of law, there was no impeachment. This is especially true in light of *Knight v. Handley Motor Co., Inc.*, 198 A.2d 747 (1964). The District of Columbia Court of Appeals apparently overlooked the testimony of the witness Hendricks with regard to operation of the automobile by the appellant. And on the question of operation by another, even if the question of permissive use *was* for the jury (which appellant definitely does not concede), the appellee was required to show agency on the part of the driver and this he did not do.

III

The District of Columbia Court of Appeals was incorrect in extending the application of Article XIV, Section 98, Traffic and Motor Vehicle Regulations of the District of Columbia so as to require removal of keys from anywhere on the car. The regulation requires only removal from the ignition. Failure to remove the keys from another place about the vehicle could be considered as a separate act of negligence but not as a violation of Section 98. (Of course, appellant would then make the argument that a thief breaks the chain of causation)

IV

The District of Columbia Court of Appeals incorrectly used the "grouping of contacts" theory in resolving a conflict of law. Maryland law should have been used.

Assuming arguendo that the appellant had been negligent in leaving the keys about the vehicle, under Maryland law, a thief would break the chain of causation so as to relieve the appellant of responsibility of resulting damages by means of the operation of this vehicle.

The "grouping of contracts" or "most significant interests" doctrine should not be used here but only under extraordinary circumstances.

However, if such a doctrine should be used in this matter, it is the appellant's position that Maryland *has* the most significant contacts and interests and its law must be applied.

Maryland has rejected the above choice of law doctrine.

ARGUMENT

I

In applying one part or clause of Section 40-424, District of Columbia Code (1961 Ed.) as a rule of evidence, the District of Columbia Court of Appeals erred. As indicated in the dissenting opinion, (JA 54, 55) that statute has absolutely no application to an accident occurring outside the District of Columbia. The section itself restricts its application to motor vehicles "operated upon the public highways of the District of Columbia." It was decided in *Knight v. Handley Motor Co., Inc.*, 198 A.2d 747 (1964), that Section 40 - 424 has no extraterritorial effect.

The clause applied by the District of Columbia Court of Appeals is not a rule of evidence to be applied but a part of the entire section which comprises substantive law. The District of Columbia Court of Appeals, then, erred in ruling that this clause was procedural or a rule of evidence.

This "clause" cannot be used without applying the entire section and the entire Section 40 - 424 cannot be used because it is substantive and applies only to cars operated on the public highways in the District of Columbia. The accident here occurred in Maryland.

The dissenting opinion below also points out that Section 40 - 424 cannot be used, even to District of Columbia accidents until there is a determination that the owner was not the driver. (JA 56, fn. 1) There was no such determination here; on the contrary, the appellees strongly urge that the appellant-owner was driving his vehicle.

This incorrect application of Section 40 - 424 by the District of Columbia Court of Appeals should not be allowed to stand by this Court.

II

On the question of operation of the appellant's vehicle at the time of the accident, the trial judge ruled as follows:

1. There was no evidence to establish that the appellant Mr. Gaither was operating his car (JA 40). *All* testimony was to the contrary.

2. The denial of agency and permissive use was uncontradicted and not rebutted. (JA 41).

Under Maryland law, there is a presumption that the operator of a vehicle is the agent, servant, or employee of the owner, acting within the scope of his employment at the time of the accident. *Wagner v. Page*, 179 Md. 465, 20 A.2d 164 (1941); *Hoerr v. Hanline*, 219 Md. 413, 149 A.2d 378 (1959). But when the presumption is rebutted by a denial of the owner the burden of proceeding with the evidence shifts to the plaintiff *Grier v. Rosenburg*, 213 Md. 248, 131 A.2d 737 (1957). If the plaintiff fails to go forward with the evidence then the denial of agency, if uncontradicted and conclusive, requires the trial judge to direct a verdict. *Wagner v. Page* (supra), *Knight v. Handley Motor Co., Inc.*, 198 A.2d 747 (1964).

The burden on the plaintiff is to show, not mere permission, as in the District of Columbia, but actual agency. It is a heavy burden.

The District of Columbia Court of Appeals apparently felt that contradictions in appellant's case required submission of the case to the jury on the issue of permissive use (JA 49). (That court was apparently satisfied that the appellant was not operating the vehicle himself). *But permissive use is not enough in Maryland to hold the owner liable*. There must be a showing of agency. No evidence of the appellees made an issue of whether the appellant's *agent* was operating the vehicle.

The evidence of the appellant in denial of use and agency was overwhelming. He denied operating his vehicle or allowing another to do so and his denial was substantiated by a witness who came from Virginia Beach, Virginia to testify, Phillip Hendricks. (JA 22) Hendricks left the appellant in his apartment at approximately 11:30 P.M. (JA 23). The accident occurred several miles from Washington, D.C. where the appellant lived (JA 19). It would have been impossible for the appellant to be present, if Hendricks were believed and Hendricks' testimony was never impeached in the slightest.

The District of Columbia Court of Appeals used three minor pieces of evidence, magnified by the appellees, to reach its finding that there may have been impeachment:

1. That the appellant did not hear his telephone in the late night or early morning (JA 48). This is not surprising.

2. A purported, though unreal, discrepancy in the appellant's deposition (JA 48) brought about by counsel's mode of questioning in not allowing the appellant to finish his answer.

3. The fact that appellant testified that tools were missing from his vehicle *when he reclaimed it*, at a gas station (JA 48). This was

never contradicted by any testimony, but was, in fact, substantiated by the witness Hendricks (JA 23, 24).

Cases were cited by the majority opinion to show that contradiction of a denial of permissive use can come from the owner's testimony. These cases, *Hiscox v. Jackson*, 75 U.S. App. D.C. 293, 127 F.2d 160 (1942) and *Farrall v. Ellis* 157 A.2d 127 (1960) can be distinguished by pointing out that the testimony contained, in those cases, gross and glaring inconsistencies and was violently contradictory on several key issues. Here, any inconsistencies are quite minor and explainable.

Before the question of impeachment is sent to the jury there must be two inconsistent versions, something else for the jury to believe if they feel the impeachment was successful, other than speculation.

Under the circumstances (the plaintiff's position being uncontradicted and unchallenged) the directed verdict was proper. *Stone v. Stone*, 78 U. S. App. D. C. 5, 136 F.2d 761 (1943); *Perlman v. Chal-Bro., Inc.*, 43 A.2d 755 (1945).

The trial court's judgment should not have been disturbed.

III

The trial court refused to allow Article XIV, Section 98, Traffic and Motor Vehicle Regulations of the District of Columbia into evidence (JA 34, 35, 36) because it was not supported by evidence and because it would allow the jury to speculate (JA 35, 36).

The only testimony as to the location of the keys was a statement attributed to the appellant that the keys might have been left in the tailgate (JA 18, 19).

The question involved here is whether, if the keys had been left in the tailgate, Section 98 may have been considered to have been violated.

The section was meant to apply only to the act of leaving keys in the ignition. *Ross v. Hartman*, 78 U.S. App. D.C. 217, 139 F.2d 14, cert. den. 321 U.S. 790, 64 S. Ct. 790, 88 L. Ed. 1080 and *Bullock v. Dahlstrom*, 46 A.2d 371 (1946), are clear on this point from the facts of those cases.

Section 98 was *not* meant to apply to the act of leaving the keys in the tailgate, in the glove compartment, on the roof, taped to the underside of the vehicle or anywhere else but in the ignition.

True, the act of leaving the keys in the tail gate might be considered by the jury as an act of negligence apart from the traffic regulation, but even then, as discussed hereafter, Maryland law would prevent presentation to the jury.

IV

If Maryland law applies, however, it is immaterial to decide whether Section 98 should have been allowed into evidence.

For in applying Maryland law to a similar situation a federal court indicated that the intervening actions of a thief who steals a vehicle with the keys left in the ignition break the causal chain and prohibit a jury determination. *McAllister v. Driever*, 318 F.2d 513 (4th Cir. 1963). To the same effect is the holding of the Maryland Court of Appeals in *Liberto v. Holfeldt*, 145 Md. 62, 155 A.2d 698 (1959).

The majority opinion concedes that the traditional position of this jurisdiction had been to apply *lex loci delictus* and cites the list of cases to that effect (JA 52). However, the District of Columbia Court of Appeals felt that this case called for applying a new conflicts of law rule, namely that known as the "grouping of contacts" theory (JA 54).

This Court has used the contacts theory in past cases, notably in *Tramontana v. S. A. Empresa de Viacio Aerea Rio Grandense*,

121 U.S. App. D.C. 338, 350 F.2d 468 (1965) and *Williams v. Rawlings Truck Line, Inc.*, 123 U.S. App. D.C. 121, 357 F.2d 581 (1965).

In the *Tramontana* Case (supra), a wrongful death action, this Court apparently refused to apply the *lex loci delictus* because it would be contrary to the strong public policy of the forum. But this Court acted with great hesitancy in departing from the traditional position on conflicts of law.

In *Williams v. Rawlings Truck Line, Inc.*, (supra), this Court described the factual circumstances as a classic "false conflicts" situation in determining that the District of Columbia had the most significant contacts and interests.

There is no special circumstance here as was involved in those cases.

The case of *Richards v. United States*, 369 U.S. 1 (1962), was a wrongful death action involving the Federal Tort Claims Act. The language of that case cited by the majority, namely that, ". . . there may be situations where the application of the old rule 'might appear inappropriate or inequitable' "; is important.

The language and facts of these cases show that the "contacts" theory should not be used indiscriminately.

It is significant that Maryland has rejected the choice of law rule in the case of *White v. King*, 244 Md. 348, 223 A.2d 763 (1966) wherein the Maryland Court of Appeals stated that a change of the traditional conflicts of law rule was within the province of the legislative body of that state.

In any event the dissenting opinion below felt that the most significant contacts here were those of Maryland (JA 56). These were:

1. The accident occurred in Maryland.
2. A Maryland resident suffered the damage.

Therefore, it is argued that the District of Columbia erred not only in the *use* of the "contacts" theory but even in its *application.*

The dissenting judge below stated:

> "This is no case for 'choice of law'. We should follow our previous decisions and apply Maryland law. If the majority opinion stands, the trial court hereafter in every case claiming negligence in another jurisdiction will be faced with the question of what law is applicable, and will have no definite guidelines to answer the question". (JA 56)

The need for following the doctrine of *lex loci delictus* is even more acute in this jurisdiction because of the peculiar geographical area which "brings into play" the conflict of laws situation constantly.

CONCLUSION

It is respectfully submitted that this Court should reverse the holding of the District of Columbia Court of Appeals reversing the judgment of the trial Court.

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Attorney for Appellant

CONTENTS OF JOINT APPENDIX

JOINT APPENDIX

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

CHARLES R. MYERS
4245 Silver Hill Road
Suitland, Maryland

and

AMERICAN MOTORIST INSURANCE CO
A Corporation
1301 H Street, Northwest
Washington 5, D.C.

Plaintiff

-vs-

FREDERICK O. GAITHER
2416 Pennsylvania Avenue, N.W.
Washington, D.C.

Defendant

Civil Action
No. M 8619-62

RELEVANT DOCKET ENTRIES

October 12, 1965 - Defendant's oral motion for a directed verdict renewed at the conclusion of all the testimony granted.

Wherefore, Directed verdict for the defendant, J. Malloy.

October 18, 1965 - Judgment on directed verdict for the defendant, plus costs. J. Malloy, H.A.M.

October 21, 1965 - Notice of appeal filed by plaintiff.

COMPLAINT

1. On or about the 22nd day of May, 1960, on Penn-

sylvania Avenue near West Phalia Road, Forestville, Maryland, an automobile owned by Frederick O. Gaither was operated in a careless and negligent manner so as to strike and collide with an automobile owned by the plaintiff, Charles R. Myers.

2. At the time, the damaged automobile was insured by the plaintiff insurance company against collision damage in excess of One Hundred Dollars ($100.00).

3. As a result of the collision, the said automobile was damaged to the extent of Five Hundred Seventy Eight Dollars and Seventy-eight cents ($578.78) and the insurance car carrier was called upon to and did pay the sum in excess of the deductible.

WHEREFORE, The individual plaintiff demands judgment in the sum of One Hundred Dollars ($100.00) and the insurance carrier demands judgment in the sum of Four Hundred Seventy Eight Dollars and Seventy-eight cents ($478.78), against the defendant.

BRAULT AND GRAHAM

/s/ ALBERT D. BRAULT
Attorney for the Plaintiffs

ANSWER

FIRST DEFENSE

The complaint fails to state a cause of action upon which relief may be granted.

SECOND DEFENSE

The defendant admits that a collision occurred at approximately the time and place alleged in the complaint but denies negligence, is without information or knowledge sufficient to form a belief concerning the damages allegedly sustained by the plaintiffs and demands strict proof thereof.

THIRD DEFENSE

The defendant asserts that damages, if any, sustained by the plaintiffs were caused by the sole or contributory negligence of the plaintiff, Charles R. Myers.

All allegations not specifically admitted, avoided or denied are denied.

COLLINS AND ANDERSON

/s/ Darryl L. Wyland
Attorney for Defendant

Defendant demands a trial by jury as to all issues.

/s/ Darryl L. Wyland
[Certificate of Service Dated December 17, 1963]

JUDGMENT

JUDGE MALLOY
October 18, 1965

Judgment on directed verdict for the defendant, plus costs.

NOTICE OF APPEAL

Notice is hereby given that plaintiff appeals to the D.C. Court of Appeals for the District of Columbia from the judgment of this Court entered on the 18th day of October, 1965.

JOHN J. O'NEILL, JR.
1750 Pennsylvania Avenue, N.W.
Washington, D.C.

BRAULT, GRAHAM,
SCOTT AND BRAULT

/s/ BEN COTTEN
Attorney for Plaintiffs

3 PROCEEDINGS

Monday, October 11, 1965.

(Voir dire examination and selection of jurors not reported.)

(Opening statements of counsel to jury not transcribed.)

(Deposition of Charles R. Myers, Plaintiff, was read to the jury. Mr. Lawrence Scott of the firm of Brault, Graham, Scott & Brault took the stand and read the answers. Mr. Cotten read the questions on direct examination and Mr. O'Neill on cross examination.)

MR. COTTEN: I would like to call Mr. Gaither as an adverse witness, your Honor.

THE COURT: All right.

EVIDENCE ON BEHALF OF THE PLAINTIFF

FREDERICK O. GAITHER

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COTTEN:

Q. Would you identify yourself by name and occupation to the Court? A. Frederick O. Gaither, landscape architect.

Q. You are the defendant in this case? A. Yes.

[4] Q. It was your car that was involved in the accident? A. Yes.

Q. And the keys that were found in the car at the time of the accident were your keys? A. They were my keys.

Q. How many sets of keys did you have for this automobile at the time of the accident? A. Two.

Q. Was this set of keys that was found in the automobile the same set of keys you had used to operate your car earlier that day? A. That is correct.

Q. What had you done earlier this day? We are referring now to June 22. A. I had worked on a job in Chevy Chase, Maryland – in fact, two jobs.

Q. Mr. Gaither, were you alone on these jobs? A. No, I was not. Mr. Hendricks was with me.

Q. Is that the same Mr. Hendricks that is sitting in the courtroom today? A. It is.

Q. What relationship is Mr. Hendricks to you if any? A. No relationship.

Q. What was his relationship at that particular time? A. He was an employee.

[5] Q. When was the last time you and Mr. Hendricks had any business together? A. It may have been – I couldn't say exactly but probably it was in 1961. It may have been as late as 1962.

Q. Mr. Gaither, what did you do with your automobile when you parked it for the final time on this particular day, June 22, 1960? A. This was in 1960. What I did with it was to park it in the 2400 block of L Street.

Q. Is this on a public street or a parking lot? A. No, this is a public street with unlimited parking on one side of the street, the same side that Columbia Hospital is on.

Q. What time of day did you park it? A. Between four and five, I think. I am not sure.

Q. Do you recall what time you left work that day? A. No.

Q. Do you recall whether or not anyone was with you when you parked the car? A. No one was with me when I parked the car.

Q. When you parked the car what then did you do? A. I took the keys – with this 1958 model you had to operate the tail gate to secure the car by turning the key in the tail gate.

Q. What type of car was this? [6] A. A 1958 station wagon. The glass in the tail gate slips down into the tail gate and then you open the tail gate to make a complete opening.

Q. How many sets of keys did you have on your person

at the time you parked your automobile? A. I had the ignition key.

Q. Any others? A. Well, I had my house key.

Q. Was it on the same ring? A. No.

Q. You had two separate rings or sets of keys? A. Two separate rings, one for the car and one for my residence.

Q. What keys were on the same ring that served for the ignition key to the automobile? A. The ignition and the tail gate key. In other words, just one key for the ignition and one for the doors and tail gate.

Q. Do you recall anything about the weather on this particular day? A. It was a good clear day.

Q. What did you do with your windows on your automobile when you parked it? A. I am sure that I rolled them up.

Q. What do you recall about the property, the material [7] and tools that were in the car on this day? A. What do you mean by that?

Q. I believe that in the opening statement it was referred to that there was certain tools. Was there anything in your station wagon at the time you parked it? A. Oh, yes, because on this job I had been working on it was quite an expensive job in which we utilized more tools than we would use on a landscaping job due to the fact we had been putting in walls and did a lot of measuring work and there was a different type of tools. We are cleaning up the job, in other words getting ready to turn the job back to the patron. There also had been considerable carpenter work such as forms, and brick work. Therefore, on this particular day there was more tools in the car than would be normal due to the fact we were clearing the tools out from this particular job. There were tools in addition to normal landscaping tools.

Q. These tools were in the car when you parked it? A. They were in the car, yes.

Q. Was there anything else than tools in stock in the car? A. Well, a couple of rolls of postage stamps, umbrellas, top coats, rain coats and galoshes.

Q. Several things of value there? A. Well, the things were of value but electrical tools [8] are quite expensive. All of the tools in the car were quite expensive tools.

Q. Did you lock this automobile, Mr. Gaither? A. Yes.

Q. Was this automobile the type you had to lock with the key or could you depress the lock? A. Oh, no. You locked it with a key.

Q. Would the same key that locked the door lock the gate? A. Well, I think so. I know one key had to be used for the tail gate.

Q. Mr. Gaither, you keep repeating the fact this was 1960. Is there any question in your mind that you did in fact lock this automobile on this particular day in 1960? A. No.

Q. Do you know whether or not you put the keys anywhere after you locked the automobile or what you did with the keys? A. Well, I would normally put them back in my pocket.

Q. Do you recall putting them in your pocket on this particular day? A. I don't recall putting them in my pocket. It would be impossible for me to recall that in 1960.

Q. You don't recall what you did with the keys but you recall you locked the car?

[9] MR. O'NEILL: I object to counsel arguing with the witness. He had already testified two or three times he did lock the vehicle.

MR. COTTEN: He is an adverse witness, therefore I am entitled to treat him as a hostile witness.

THE COURT: You may proceed.

BY MR. COTTEN:

Q. Mr. Gaither, what did you do after you locked the automobile? A. I went home.

Q. How far was your home from the spot where you parked your automobile and locked it? A. About as far as from here to the next building.

Q. Was your automobile visible from the entrance to your house? A. No.

Q. Did you ever go out again at any time that evening after you supposedly parked your car? A. No.

Q. Did you ever observe it again after your parked it? A. No, I didn't.

Q. Do you have any clear estimate as to the exact time when you parked it? Was it closer to four or closer to five? A. I would say the closest I could come to it was between [10] four and five.

Q. After you went in your house after parking the car what did you do? A. I stayed there. I probably went down to the drug store, which would be normal for me to do, to pick up the paper.

Q. When you went out to the drug store did you observe your automobile? A. You couldn't see it from Pennsylvania Avenue.

Q. You didn't have to go by your automobile to get to the drug store? A. My address was on Pennsylvania Avenue.

Q. Was there any way you could identify this particular set of keys you have characterized as your set of ignition keys and the keys with which you locked the automobile? In other words, you could identify them as to either pair of keys – was that the case? A. They were not in a case. There were two keys on a chain.

Q. Was anything else on this chain? A. No. Not that I remember.

Q. Mr. Gaither, did you at any time on this evening after you parked your car and went into your house encounter anyone whose name you recall? A. Well, I encountered my neighbors who lived in the building.

[11] Q. Anybody else? A. Another neighbor who lives in the next building who is a school teacher. I think his name is Bob Miller, I believe it was. He stopped by some time during the evening with two of his friends. Q. Anybody else? A. I saw a neighbor who lives on the same floor I do, an elderly man, and I talked to several people on the phone. Mr. Hendricks came up late in the evening.

Q. About how late? A. Oh, I don't know, ten or ten-thirty, something like that. He lives in the next block to me – Hendricks did. He was the one I had been working with on that day.

Q. Did Mr. Hendricks ride home with you on this particular day? A. I dropped him off on the way home.

Q. You say then he came by at ten o'clock? A. I didn't time it. I think it was around ten.

Q. It was after you had already seen Mr. Miller and been to the drug store? A. Yes. Mr. Hendricks was next to the last person I saw. The last person I saw was Mr. Studd.

Q. You saw Mr. Studd after you saw Mr. Hendricks? A. Yes. Mr. Hendricks left after we had watched the eleven o'clock sports on T.V. My usual custom was to stop in [12] just before I went to bed because Mr. Studd was a man perhaps in his late seventies, had a very bad heart condition, and no close relatives. I would stop in and check to see if he needed anything.

Q. Did you indicate earlier that Mr. Studd was deceased? A. That is correct. He is dead.

Q. When did you recall that Mr. Hendricks came up to visit you on the night of this accident at ten o'clock?

(There was no answer)

Q. When did this come back to your memory? A. Come back to my memory?

Q. Was it recently that you remembered Mr. Hendricks came back? A. It was some time ago.

Q. Do you remember having your deposition taken in our office? A. I do.

Q. Do you remember being asked at the time concerning your activities on the night in question? A. Yes, I do.

Q. Do you recall whether or not you told me at that time, which was August 6, 1964, that Mr. Hendricks had come by and stayed from ten until after eleven o'clock? A. Do I recall what?

Q. Whether or not you told me at that time that Mr. [13] Hendricks had come by at ten o'clock and stayed until after the eleven o'clock news? A. I don't recall.

Q. If I told you you hadn't told me would this seem inconsistent with your memory? A. No, it wouldn't seem inconsistent.

Q. Do you remember whether you identified Mr. Robert Miller as coming by with a friend on the night in question when I asked you this over a year ago? A. No.

Q. When did you remember that Mr. Miller came by? A. Well, in reconstructing as well as I could. I still must say that this happened over five years ago and I cannot remember all the details.

Q. Are you telling me that it is easier for you now, which is five years, than it was a year ago when it was only four years, as to who came by and who didn't? A. Yes, because I have had time to think it over. I tried to recall everything I could.

Q. How did Mr. Hendricks happen to come to your home on this particular night? Did he call you or did you call him? A. Mr. Hendricks came by, one, to watch the eleven o'clock news as he quite frequently did, and the other was to inquire about what the work schedule for the following day would be, [14] due to the fact we had cleaned up one job and he wanted to know what we would be doing the next day.

Q. So that your next day was to be a working day? A. Yes.

Q. What time do you usually arrive on a working day? A. Arrive where?

Q. Arise. Get up. A. It all depends on what kind of work we are doing.

Q. Do you recall what you were going to be doing on the 23d? A. No, I don't.

Q. Do you recall when I asked you on three separate occasions if you recall any other activities than a trip to the drug store and some telephone conversations—do you recall that particular question? A. No, I don't.

Q. I show you –

THE COURT: Well, you may read the question and answer, then ask him if he recalls it, and give us the page number.

BY MR. COTTEN:

Q. Referring to page 23 of Frederick O. Gaither's deposition, approximately the middle of the page:

> "Q. Do you recall any other activity other than perhaps his trip to the drug store and telephone [15] conversation on this particular night? A. No."

Does that refresh your memory?

A. Yes.

Q. Referring, your Honor, to page 11 of Mr. Gaither's deposition, a question about the middle of the page:

> "Q. Did you come into contact with anyone on this particular night that you can recall? A. I talked to several people on the phone, over the telephone."

Do you recall that, Mr. Gaither? A. Yes.

Q. Page 9 of the same deposition, at the bottom of the page:

> "Q. Did you ever again leave your home on this particular night after arriving home from work? A. I don't think I did. If I did I might have gone to the drug store to get a paper or something like that, which is adjacent to the building, in the same block."

Do you recall saying that?

A. Yes, I do.

Q. Mr. Gaither, do you recall what time you went to bed on this night? A. No, I don't.

[16] Q. Do you recall when, if not the exact time, in relation to when Mr. Hendricks left that you went to bed? A. Well, between twelve and one, I would say.

Q. Were you still in the same clothes you had on when you came home from work that evening? A. I don't think so.

Q. You don't remember whether you changed clothes or not? A. I usually change clothes, yes, sir.

Q. What was your first notification your automobile had been in an accident? A. A call from the police.

Q Do you recall what time that was? A. No, I don't. I had gone to sleep. The telephone woke me up.

Q. You have no idea? A. No.

Q. Do you recall who called you or who identified himself other than just the police? A. I think the man identified himself as a Prince Georges County policeman.

Q. Do you recall what your phone number was on that particular day? A. It is the same as it is today.

Q. What is that? [17] A. Federal 7-4860.

Q. Would you characterize yourself as a heavy sleeper, Mr. Gaither? A. Yes.

Q. Did you have any conversation with the police officer when he notified you your car had been involved in an accident? A. What type of conversation?

Q. Any whatsoever? A. I answered him. He asked me about the car, the color, license plate, number and so on. I said, "Yes, this is my car." I cannot give you verbatim the conversation. When I say, "Yes, it is my car," he said, "It has been involved in an accident." I said, "Well, no one was driving it. It was parked here." He told me it had been involved in an accident and would I come down. I don't know what the conversation was, whether to come then or come in the morning. I said, "I don't have any way to come down now," but I would come down in the morning, which I did.

Q. You did go down in the morning? A. Rather early the next morning.

Q. Did you see your car when you went down in the morning? A. Yes.

Q. What did you observe about the property that had been in this automobile? [18] A. There was no property in it. The tools and everything except a little bit of debris had been removed – all my tools.

Q. All your tools had been removed? A. Yes.

Q. Did you have any conversation with the police when you went to pick up your car? A. Yes, I did. I went there first, I believe, and he told me where I could find the car. There was a little brief case there and he asked me whether it was my brief case. I said it was. Whether or not I signed

a receipt for it I don't remember but anyhow it was a brief case in which I carry prices and catalogues. It was a little brown one.

Q. Was this in addition to the other brief case? A. I have one in which I carry current records, checks, and that type of thing. It is what you are using, an expensive type, like the one you are working on there. The other was a brown one, a cheaper type, which was returned to me. I use it in estimating but not in executing the job.

Q. You are not hard of hearing? A. Not overly.

Q. Do you have any trouble hearing the telephone? A. Heaving over the telephone?

Q. Hearing the telephone ring? A. No.

[19] Q. Did you ever tell the police officer what you did with the keys to your car after you supposedly locked it? A. Did I what?

Q. Did you ever tell the police officers what you did with the keys to the car after you supposedly locked it? A. No.

Q. You never told them? A. I don't recall any conversation about that.

MR. COTTEN: I have no further questions.

CROSS EXAMINATION

BY MR. O'NEILL:

Q. Is it true your memory of some of these facts as to the accident has been refreshed after discussing it with Mr. Hendricks? A. Yes.

MR. O'NEILL: No further questions.

JAMES B. RASH

was called as a witness on behalf of the Plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COTTEN:

Q. Will you identify yourself by name and occupation? A. James B. Rash, Corporation of Prince Georges County police.

Q. Were you so employed on June 22, 1960? [18] A. I was employed as a private at the time.

Q. Corporal, directing your attention to this particular date, did you have occasion in connection with your duties to investigate an accident that occurred in Maryland on Route 4 near Westphalia Road? A. I did.

Q. Did you investigate this accident? A. I did.

Q. Directing your attention to the diagram which we have stipulated to as representative of the officer's recollection, your Honor – I don't know whether the lines are dark enough for the jury – I don't believe they are – does that represent your recollection of the scene? A. It does.

MR. O'NEILL: I would like to interrupt Mr. Cotten. We stipulated this was the scene of the accident except this vehicle was not overturned.

MR. COTTEN: We will have Corporal Rash testify as to that.

BY MR. COTTEN:

Q. Corporal Rash, if you would step to the board for this particular part of the testimony it might be a little easier.

(The witness stepped to the blackboard.)

Q. When you arrived on the scene did you conduct an [19] investigation to determine the owners of the vehicles involved? A. Yes, I did.

Q. Would you tell us who the owners of the respective vehicles were? A. The red vehicle would be the Myers vehicle and the yellow vehicle would be the vehicle of this gentleman.

Q. Were you able to determine the point of the impact? A. Yes.

Q. Where was that point of impact in relation to the

road? A. This being a two lane highway we have two driving lanes going west. The point of impact was between the right lane and the left.

Q. Were you able to follow any type of path that the vehicle followed after this accident? A. Yes.

Q. How did you determine the path the vehicle travelled? A. By tracing the marks from the striking vehicle which went off the side of the road, off into the grass.

Q. We have four vehicles placed up there. What do the other two vehicles represent, the other red and yellow vehicle further down the road. A. This red vehicle represents where the Myers vehicle came to rest after being struck. This represents where the other vehicle came to rest.

[20] Q. Would you describe the arc or path that was followed by the striking vehicle? A. Well, after the collision – from the point of collision it travelled across to the left lane off onto the median strip and back into the roadway and across the roadway off into the grass, and over into a pole where it came to rest.

Q. Were there any measurements as to the point of impact and where the respective vehicles came to a stop? A. From the point of impact to the place of rest of the striking vehicle was a distance of 960 feet.

Q. What about the Myers vehicle?

(Answer inaudible.)

Q. Did you have occasion to determine the time that you received the call? A. I received the call at 11:30 p.m. on the 22nd of June.

Q. When you arrived on the scene what did you observe? A. I observed a 1956 automobile, two door sedan, with Maryland registration EJ-4-107, which had been struck in the rear left quarter panel. I didn't see the striking vehicle until I passed down here and this turned out to be a 1958 Ford station wagon with D.C. registration PY-574.

Q. Were you able to determine the owners of these vehicles? A. In the striking vehicle, the 1958 Ford station wagon, I located a brief case and some check books and other personal [21] papers belonging to Frederick O. Gai-

ther III. This seemed to be his car. After checking the registration we called him.

Q. Whom did you discover was the owner of the other vehicle involved? A. Mr. Robert Myers.

Q. Who were the drivers of these vehicles at the scene of the accident? A. Mr. Myers was the operator of the Oldsmobile which was struck in the rear. The operator of the 1958 Ford had left the scene before my arrival.

Q. Was there any search made for the driver of the other vehicle at the scene of the accident? A. Yes, we looked all over and couldn't find him.

Q. What did you do after leaving the scene of the accident? You may resume the stand if you wish.

(The witness resumed the witness stand.)

A. After we had cleared the scene and the vehicles had been removed I went back to the Seat Pleasant station where I was stationed at the time and tried to determine the ownership of the Ford Station wagon.

Q. How did you go about checking the ownership of the striking vehicle? A. From the tag registration through the Department of Motor Vehicles of the District of Columbia.

[22] Q. By what time had you determined the ownership of the vehicle? A. I determined the ownership of the vehicle at approximately 12:30 to quarter to one in the evening.

Q. What did you next do? A. I attempted to locate the owner of the car to find out if he had been driving it or had loaned the car to somebody else.

Q. What attempt did you make to locate the driver of this car or the owner of this car? A. I attempted to call his home phone number.

Q. Where did you obtain his phone number? A. From the telephone book. It was registered under his name –

Q. Go ahead. A. I called this number several times. Not receiving any response on the phone I called the Metropolitan Police Department and asked them if they would make the notification for me that we had this car impounded. Their return was that they were unable to raise anyone at that address.

Q. What time was contact made with Mr. Gaither? A. Contact was finally made at 3:30 a.m. on the 23d.

Q. During the time from 12:30 p.m. to 3:30 a.m. do you have any estimate of the number of times you attempted to contact Mr. Gaither by phone? [23] A. I don't recall but I would say a half dozen times.

Q. Do you recall any statement made by Mr. Gaither when you notified him his car was involved in an accident? A. He couldn't give me any reason why his car was in Maryland at all.

Q. Did you have occasion when you impounded this car to observe anything in the vehicle? A. There was some garden equipment, shovels and rakes and items of that nature.

Q. What was done with this equipment? A. It was left in the vehicle and impounded at the Amoco Service Station at 83301 Marlboro Pike.

Q. Did there come a time when Mr. Gaither appeared to reclaim his automobile? A. I met Mr. Gaither at Seat Pleasant Station the following morning and he signed a property release for the brief case and personal check books.

Q. Were the other items in the car returned to Mr. Gaither? A. To my knowledge they were.

Q. Was there any conversation concerning the ownership of the keys which were found in the vehicle?

MR. O'NEILL: I object to the police office stating anything which Mr. Gaither said on the ground that this of course is hearsay.

[24] THE COURT: It is not hearsay if Mr. Gaither said it. The question is what Mr. Gaither told the officer?

MR. COTTEN: Yes. First was there any conversation between them.

THE COURT: He may answer.

THE WITNESS: In talking to Mr. Gaither on the morning of the 23d of June I asked him if he had left the keys in the vehicle.

BY MR. COTTEN:

Q. What was his reply? A. His reply was that he didn't

leave the keys in the vehicle but must have left them in the tail gate when he was locking it.

MR. COTTEN: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. O'NEILL:

Q. Based on your investigation at what time do you place the occurrence of this accident? A. I place the time of the occurrence at the time I received the call, which was 11:25 p.m.

Q. Well, the accident would have had to have occurred before that, would it not? A. Two or three minutes before, possibly.

Q. Mr. Rash, did you testify how far the scene of the [25] accident is from the city of Washington -- the city limits? A. The exact distance I cannot give you. I would say it was approximately four and a half or five miles from the district line.

Q. From the District line itself? A. Yes.

Q. That would be the south east section of Washington? A. That would be the south east section of Washington, Southern Avenue and Pennsylvania Avenue.

Q. In other words, if you were to follow Route 4 northward you would enter Washington on Pennsylvania Avenue, is that correct? A. Yes.

Q. Mr. Rash, I imagine you observe quite a few victims of different automobile accidents, is that correct? A. True.

Q. Do you think that you would be able to judge by observing the condition of a vehicle after an accident somewhat as to the condition of the driver.

MR. COTTEN: Your Honor, I think that is drawing a pretty broad conclusion there.

THE COURT: I think he can be asked the condition of the car as he saw it but not to speculate.

BY MR. O'NEILL:

Q. Based on the condition of the vehicle, Mr. Gaither's [26] vehicle, as you observed it at the scene of the ac-

cident, what was your estimate as to the condition of the driver of the vehicle?

THE COURT: That is the same question. I said you make ask him to describe the condition and location of the car, the damage to the car and what not.

BY MR. O'NEILL:

Q. Would you do that? A. The condition of the car – Mr. Gaither's car, the 1958 Ford station wagon, had been quite extensively damaged on the right front side, right front fender, headlight, front wheel. The Myers vehicle was struck in the left rear. It was extensively damaged along the left rear bumper, left rear quarter panel, and damage to the gas tank so the vehicle had to be towed.

Q. The damage to both vehicles would be described then as extensive? A. Yes, sir.

THE COURT: Was the Gaither car upright, Officer?

THE WITNESS: Both vehicles were upright, yes, sir.

BY MR. O'NEILL:

Q. Do you recall how much garden equipment was in the Gaither vehicle? A. No.

Q. Would it have been one piece of equipment? [27] A. No, there were a number of pieces of equipment, but the number I didn't count.

Q. Do you know from your personal knowledge whether or not the Metropolitan Police attempted to contact Mr. Gaither? A. Only the return we got from the Communications Department of the Metropolitan Police Department.

Q. Did Mr. Gaither ever tell you that tools had been missing from his vehicle? A. No, sir.

MR. O'NEILL: No further question of this witness.

MR. COTTEN: I have no further questions.

THE COURT: Did the man reclaim the tools, Officer?

THE WITNESS: Not that I know of.

MR. COTTEN: May the witness be excused? He has been waiting around all day.

THE COURT: I assume there is no objection. All right, sir, you are excused.

(The witness left the stand.)

MR. COTTEN: We have no further testimony and except for the appropriate statutes which we will submit at the appropriate time we rest.

MR. O'NEILL: Before I open my case I would like to approach the bench.

(Counsel approached the bench and conferred with the Court as follows:)

[28] MOTION FOR DIRECTED VERDICT ON BEHALF OF DEFENDANT

MR. O'NEILL: At this time I would like to make a motion for directed verdict on the basis Mr. Cotten has not proved the allegations in the complaint of negligence. In other words, there has been no showing of negligence that would either place Mr. Gaither in the car or to negative his testimony that he locked the car. The police officer didn't testify as to that. I don't think there is any proof of negligence. There is nothing to disprove the fact that Mr. Gaither locked his car and was home at the time of the accident.

MR. COTTEN: I would contend that there has been no denial of the fact that the keys found in the car were the same set of keys that the defendant had been using. The officer's testimony was that in response to his question the defendant stated he left the keys in the tail gate. We think under the statute –

THE COURT: Which statute is that, the Maryland statute?

MR. COTTEN: Well, that a vehicle parked on the street should have the keys removed. I have the Code here. It is identical in phrasing with the District of Columbia code.

THE COURT: Is there a presumption of agency in Maryland?

MR. COTTEN: No, sir, there is no presumption of agency merely by ownership. A violation of the statute can [29] be evidence of negligence. There is no denial that the keys were in the car. He said he did lock it and if he did lock it we don't understand how the keys got there. There

is a dispute between the police officer and Mr. Gaither as to what he did with these keys.

MR. O'NEILL: I don't think there is any dispute there. The only conversation with the police officer was that he didn't leave the keys in the ignition. I would even make the argument that even if he did it occurred in the District and the Maryland statutes would not apply. The State of Maryland cannot regulate conduct in the District of Columbia.

MR. COTTEN: Under the substantive law of Maryland facts that constitute negligence have to be considered in the light of all the facts including such facts as started in the District of Columbia and culminated in Maryland. I have case law which says enforcement of the Maryland statutes applies. There is a prohibition against leaving an unattended vehicle on public streets with the keys in the ignition.

MR. O'NEILL: Yes, locking the ignition, that is all that is required.

THE COURT: I will deny the motion at this time. You may renew it, at a later time.

MR. O'NEILL: Thank you.

(Counsel returned to the trial table.)

[30] EVIDENCE ON BEHALF OF THE DEFENDANT

WILLIAM P. HENDRICKS

was called as a witness on behalf of the Defendant, and having been first duly sworn, testified as follows;

DIRECT EXAMINATION

BY MR. O'NEILL:

Q. Will you state your full name and address? A. William Philip Hendricks, 2624 Subway Avenue, Virginia Beach, Virginia.

Q. Directing your attention to the 22nd day of June, 1960, were you working for Mr. Gaither, the defendant, on that day? A. Yes.

Q. Were you engaged in a landscaping contract in connection with your employment with him? A. Yes.

Q. Do you recall specifically where you were working on that day? A. Not specifically. The Chevy Chase area, as far as I remember, somewhere in that area in Maryland.

Q. Did you ride home with Mr. Gaither on that evening after your work was completed? A. He let me off downtown. He drove me into the downtown area of Washington and I got off there.

Q. Would it have been part of your duties to put the [31] tools which you used that day back into Mr. Gaither's vehicle? A. Yes, sir.

Q. Did you do so on that day? A. Yes, sir.

Q. Did you see Mr. Gaither again on the evening of the 22nd after he dropped you off down town? A. Yes, much later. I would say a little before ten o'clock I stopped by his apartment on the way to my apartment. At that time I was living just a block away from his apartment here in Washington.

Q. Was Mr. Gaither's apartment on Pennsylvania Avenue at the time? A. Yes.

Q. What time did you leave Mr. Gaither's apartment? A. Very close to eleven thirty. I remember watching television, the late news, weather and sports. Ten or fifteen minutes later I went home.

Q. So you remember watching the news, weather and sports on television that evening? A. Yes. I have many times.

Q. Did you talk again with Mr. Gaither subsequently to eleven thirty when you left? A. He called me. I don't know the time. I went home and went to bed, and he called me and woke me up. I was scheduled to meet him in the morning at seven o'clock to [32] go to work, and he called me to tell me that his car had been taken and wrecked some place in Maryland. I don't know what time it was. It seemed to me like a short time but I don't know.

Q. What did you do about the work next day? Did you

have to cancel your plans for work? A. Yes, obviously. In fact, I had to borrow a car from a friend of mine and drove him out to the place in Maryland where the car was was at a garage.

Q. Did you see the car – Mr. Gaither's car – the next morning after the accident? A. Yes.

Q. Were there any tools in the back, any tools that you had put in the back the evening before? Were these tools in the back? A. No. Nothing. It was quite empty, as I remember.

MR. O'NEILL: No further question.

CROSS EXAMINATION

BY MR. COTTEN:

Q. What day of the week was this, do you recall? A. No, sir. I don't.

Q. When were you contacted first, Mr. Hendricks, in connection with testifying for this trial? A. For this trial? I don't know. It has been a month. I would say before the 1st of April I got a letter.

[33] Q. Would that have been in 1965 or 1964? A. 1965.

Q. At the time all this transpired back in 1960 who paid your salary? A. Mr. Gaither.

Q. You were an employee of his? A. Yes.

Q. When you say you lived a block away from Mr. Gaither, did your travel to your house or to Mr. Gaither's house on this night take you by the place where he parked his car at any time? A. I didn't see the car when I went by the house. He normally parked it in that area wherever he could find space. I don't recall seeing it on my way home.

Q. You don't recall the time Mr. Gaither called you to tell you about the accident? A. No, sir.

Q. Do you know where he was when he called? A. He was in his apartment.

Q. How do you know that? A. Well, he said he was there so I had no reason not to believe it.

Q. When you went by the house on this particular evening do you recall for instance what time it was that you arrived there? [34] A. I recall it was before ten because I looked at an hour-long program that particular night. What it was I can't tell you. Obviously there was a lot of discussion about this after the accident and I remember it only for that reason.

Q. A lot of discussion at what time? Immediately after the accident? A. Well, the next day. I was unable to work. There was nothing but talk about it, so of course I remembered it.

Q. You went with Mr. Gaither to pick up his automobile? A. That is right.

Q. There was nothing in the automobile in the way of tools or anything of that nature? A. No.

Q. Were you with Mr. Gaither at all times during the period when he was reclaiming his automobile? A. The next morning?

Q. Yes. Did you stay with him all the time? A. Yes.

Q. Were you with him or were you present when there was any discussion between Mr. Gaither and a police officer? A. I was present but I don't recall what was said.

Q. You don't recall what each one of them said? A. No, not specifically.

[35] Q. Do you recall what time Mr. Gaither let you off earlier that evening? A. No, sir. I went to a down town movie but I don't recall what time it was. We were in the habit of getting off early.

Q. Do you recall what any of these tools were that you placed in the car? A. We carried power tools—electric drill, electric saw, lawn mower—and the normal garden tools, edgers, clippers and that sort of thing.

Q. When did you leave the Washington, D.C. area? A. 1962, I believe.

Q. Did you keep up a correspondence with Mr. Gaither during this period? A. Yes, I saw him many times.

Q. You saw him many times? A. Yes, I would return his visits. I had lived here twelve years and I came back to visit Washington quite often.

Q. Has he been to your particular address in Norfolk, (sic) Virginia? A. Yes.

Q. Mr. Gaither has been down there? A. Yes.

Q. Have you lived at that address since you left Washington? [36] A. Yes.

MR. COTTEN: No further questions.

(The witness left the stand.)

THE COURT: I think this is a good time to adjourn for the day. Ladies and gentlemen, we are going to excuse you now until ten o'clock tomorrow morning. I want to admonish you not to discuss the facts or the testimony you have heard up to now, among yourselves or with anyone else. That particularly applies to those at home. The reason for this primarily is that you may form an opinion after discussing the facts with somebody else. You might form an opinion which would be difficult for you to change when you enter the jury room. So you should not discuss the facts until you have heard all the testimony and the instructions of the Court.

We will adjourn now until tomorrow morning at ten o' clock.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of the following day.)

Tuesday, October 12, 1965.

[38] PROCEEDINGS

MR. O'NEILL: Your Honor, the defendant rests his case.

THE COURT: Do you have any rebuttal?

MR. COTTEN: In view of the fact the defendant has rested his case without taking the stand I would request permission to call him. Having once used him as an adverse witness it is of course within the discretion of the Court.

THE COURT: He has testified, hasn't he?

MR. COTTEN: During the presentation of our case.

THE COURT: Do you want to call him again?

MR. COTTEN: I would like to recall him inasmuch as he is not going to take the stand as part of his own case.

MR. O'NEILL: I would object to that.

THE COURT: Come to the bench.

(Counsel approached the bench and conferred with the Court as follows:)

THE COURT: I don't quite follow your idea.

MR. COTTEN: Well, the point is if he is not going to take the stand in his own defense there are certain parts of the cross examination we did not pursue as part of our case. The mere fact you call him as an adverse witness does not necessarily force you to put on all the information you have, and in many cases you can rest your case when you have completed your prima facie case.

[39] Inasmuch as he is not going to take the stand which we anticipated we will call him as our witness. I know it is discretionary.

THE COURT: You cannot call him to rebut his own testimony.

MR. COTTEN: I realize that.

THE COURT: Unless it is rebuttal testimony you cannot call him.

MR. COTTEN: It would be rebuttal testimony in terms of what he has testified to himself. It is a form of rebuttal.

THE COURT: I don't see how he can rebut his own testimony. He has testified to the facts.

MR. COTTEN: He has not testified to all of them.

THE COURT: I cannot permit it as rebuttal testimony. You cannot call an adverse witness in rebuttal unless you have some extraordinary justification.

MR. COTTEN: Well, one justification that comes to mind is simply that we did not utilize all the –

THE COURT: I still think unless it is rebuttal testimony I cannot permit it.

MR. COTTEN: Well, I am not certain it would be. It would be rebuttal testimony of one of his witnesses whom he presented yesterday, Mr. Hendricks. There is certain testimony Mr. Hendricks testified to that had not been presented [40] by Mr. Gaither, and on one or two of those matters it would be rebuttal of Mr. Hendricks' testimony.

THE COURT: It must be something that it is rebuttal to.

MR. COTTEN: That would be it.

MR. O'NEILL: I am going to object to it.

THE COURT: Well, it must be rebuttal testimony.

MR. COTTEN: It would be rebuttal of Mr. Hendricks' testimony.

THE COURT: All right.

(Counsel returned to the trial table.)

MR. COTTEN: Your Honor, I would like to have Mr. Gaither take the stand.

EVIDENCE ON BEHALF OF THE PLAINTIFF IN REBUTTAL

FREDERICK O. GAITHER

was called as a witness on behalf of the Plaintiff in rebuttal, and having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COTTEN:

Q. Mr. Gaither, you were here and heard Mr. Hendricks testify in your portion of the case, is that correct? A. That is right.

Q. Did you hear him testify as to the length of time that you had been in possession of his address at Virginia Beach? [41] A. That is correct.

Q. Have you always known his address when he has been out of this area? A. No.

Q. So that you didn't know his address when he left this area, is that what you are telling us? A. That is what I am telling you.

Q. You heard Mr. Hendricks testify he has always lived there and that you knew his address, is he incorrect? A. He was correct.

Q. Correct that you knew his address? A. He was correct that he has always lived there since he left this area.

Q. You didn't know his address? A. That is right.

Q. Have you seen him at any time during the interval when he left this area? A. Yes, I have.

Q. When did you first learn of his address? A. I learned his address after you had questioned me at the time you obtained the deposition from me in your office – after that.

Q. In other words, after we asked you where he was and you didn't know? A. I didn't know. I was quite correct, and he will [42] point that out to you.

THE COURT: You have answered the question.

MR. COTTON: I have no further questions.

MR. O'NEILL: I have no questions.

THE COURT: You may resume your seat at the trial table.

(The witness left the stand.)

MR. COTTEN: I have no further witnesses in rebuttal.

THE COURT: Do you have any traffic regulations you want to offer?

MR. COTTEN: I would offer as part of Plaintiff's case traffic regulation No. 98 regarding unattended motor vehicles. We would also like –

THE COURT: Let's take up one at a time. Have you got the regulation there?

MR. COTTEN: Yes, sir. (handing book to Court)

THE COURT: I don't see any basis for that. There is no evidence to support that regulation.

MR. COTTEN: There has been a conflict of testimony about how that vehicle was left. He said he left it locked at the curb and he doesn't know what happened to the keys. The officer testified that he left it in the tail gate. I think that would make it admissible.

[43] MR. O'NEILL: It says the ignition shall be locked and the engine turned off –

THE COURT: No, I don't think there is any evidence to support it.

MR. COTTEN: Would your Honor hear further argument?

THE COURT: No. Any others?

MR. COTTEN: May I ask you whether or not the ruling is based on whether the particular statue is applicable would be a District or a Maryland statute? A. No. I am basing it on the evidence. You have to have evidence to support the admission of a particular regulation.

MR. COTTEN: We have stipulated to the regulations, however, in the pre-trial statement.

THE COURT: Yes, the admissible regulations, but that doesn't mean any regulations. It depends on what the evidence discloses whether the regulation is admissible, and I rule there has been no evidence to support it. Any others?

MR. COTTEN: We have some statutes in the State of Maryland.

THE COURT: Are you offering them?

MR. COTTEN: Yes, sir.

MR. O'NEILL: I object to them.

THE COURT: I will have to sustain the objection [44] to that on the same ground.

MR. COTTEN: The other statutes we have to offer deal with the negligence in the operation of the motor vehicle in Maryland.

THE COURT: Well, what is the regulation that you are talking about?

MR. COTTEN: We have several of them.

THE COURT: Give us the citations.

MR. COTTEN: These are in Article 66-½ of the Maryland Code.

THE COURT: Do you have the Maryland Code there?

MR. COTTEN: Yes, I do. (handing book to the Court)

THE COURT: Which section?

MR. COTTEN: Article 66-½, Section 201 – commencing with Section 200 and 201.

THE COURT: Which one are you offering?

MR. COTTEN: 200, 201, 209, 211, 219, and 221.

MR. O'NEILL: I object to all of them.

THE COURT: 201?

MR. COTTEN: 200 and 201, both dealing with the duty of stopping and identifying oneself after the occurrence of an accident in the State of Maryland.

THE COURT: There is no evidence that this gentleman refused to do that.

[45] MR. COTTEN: Well, your Honor, there was no driver present. It is obvious that whoever was driving the automobile was not in compliance with these regulations.

THE COURT: Yes, but you have got to have evidence to support your contention that the defendant in this particular case refused to do that.

MR. COTTEN: Well, the evidence of whether or not he refused to do it depends on whether or not the jury chooses to believe that this man was the operator of the vehicle. I don't see how we can determine that in advance of submission of the question to them.

THE COURT: Well, we will excuse the jury.

(Whereupon the jury was excused from the courtroom)

THE COURT: First of all, if the jury should find this defendant was operating the vehicle he violated one of these regulations, is that your theory?

MR. COTTEN: Yes, sir.

THE COURT: Assuming the jury find that he was operating this vehicle, what relevancy has the regulations requiring him to stop and give aid? That would have nothing to do with the negligence involved.

MR. COTTEN: Questions of relevancy do not address themselves solely to the happening of the accident and negligence. We have the fact that whoever was operating the vehicle left the scene of the accident. This is the whole point.

[46] There is no question that whoever left the scene, one of the factors in inducing him to do it would be a motive, and the existence of a statute requiring him not to leave certainly has a bearing on the question of why he left.

THE COURT: Whether he left or didn't leave, Mr. Cotten, has nothing to do with negligence, and the sole issue here is whether or not the operator of the vehicle in question was negligent in the operation of his vehicle.

MR. COTTEN: Correct, your Honor.

THE COURT: Also, who was the operator.

MR. COTTEN: Correct.

THE COURT: You could offer practically every regulation in the book on that theory.

MR. COTTEN: No, sir. We are offering it on the basis of whoever the gentleman may have been. I believe, contrary evidently to your Honor's position, there has been evidence in this case that this man was operating the vehicle, and in the alternative, that certain keys were left in the vehicle.

Based upon this we are handicapped in this position, as is anybody who is the victim of a hit and run accident and then attempts to predicate the liability of the owner and/or establish whether or not he was the operator, without the benefit of these statutes.

THE COURT: I rule 201 is not relevant. What is [47] the next one?

MR. COTTEN: 209, which deals with reckless driving.

THE COURT: That would have to do with it. Do you want to say anything about that?

MR. O'NEILL: Yes, I object to the introduction of a statute dealing with reckless driving as far as it applies to Mr. Gaither until – not until but in view of the fact Mr. Cotten has not introduced any evidence to place Mr. Gaither behind the wheel.

THE COURT: Well, his point is and I think it is well taken, whoever was driving the vehicle, if the jury should find that the defendant was driving it, then this section would be applicable as to the operator of the vehicle whoever it may have been.

MR. O'NEILL: I think that is properly an instruction for the Court to give.

THE COURT: Pardon me?

MR. O'NEILL: Wouldn't that be an instruction on the part of the Court rather than –

THE COURT: We will instruct the jury they will first have to find that the defendant in this particular case was

driving the vehicle before they can apply the regulations – that is a prerequisite to it.

What is the next one, Mr. Cotten?

[48] MR. COTTEN: I think we will just rely on 224, your Honor, which is following too closely.

THE COURT: What is your theory about that?

MR. COTTEN: That fact we were struck in the rear, according to the testimony.

THE COURT: That doesn't necessarily mean you were following too closely. First, if you stopped and he ran into you, that wouldn't be applicable. There is no testimony that the plaintiff observed this car before it struck him. I don't recall anything.

MR. COTTEN: In the deposition his testimony was that he observed the glare of the headlights in the rear and then there was an impact.

THE COURT: I don't recall that.

MR. COTTEN: Well, I have the deposition here.

MR. O'NEILL: The deposition read that the plaintiff observed the headlights in the rear view mirror. I don't think that is sufficient. I think an impact in the rear can be explained by other means.

THE COURT: Did he say how far behind?

MR. O'NEILL: No, sir. He said – Mr. Cotten can read from the deposition but I don't think it is sufficient to support the introduction of this regulation.

THE COURT: Let's see what the testimony was.

MR. COTTEN: Page 11, your Honor.

[49]"Q When did you first see the vehicle which you say struck you from the rear? A. As I said before, as I recall, I had a momentary glimpse of the lights in my rear view mirror, but it was a very fleeting thing, and then I was aware of the impact and I saw the car pass me on the left and veer off to the left and then come back in front of me."

THE COURT: Well, there is some slight evidence there. We will admit it.

MR. COTTEN: Of course, your Honor, we would again offer 247, but you have already ruled on that.

THE COURT: 247?

MR. COTTEN: That is unattended motor vehicle, same as the D.C. regulation. Since it is in the absence of the jury it will not show any prejudice. Was it your ruling there was no evidence that this was an unattended vehicle?

THE COURT: The statute says no person driving or in charge of a vehicle shall permit it to stand unattended without first locking the ignition and removing the key. He testified he locked it and removed the key.

MR. COTTEN: But your Honor, there is evidence that he didn't remove the key because the keys were in the car.

THE COURT: There is no evidence they were anywhere. We are simply taking this regulation literally. It [50] means the driver of a vehicle shall not permit it to stand unattended without first stopping the engine, locking the ignition and removing the key. This witness testified he stopped the engine and removed the key.

MR. COTTEN: There have been ruling in the District of Columbia that just removing the key from the ignition and leaving it in the door –

THE COURT: No, no. This statute is very clear. There is no support for it in the evidence.

MR. COTTEN: We are dealing with District of Columbia law, in the light of a recent case –

THE COURT: Well, this would not be applicable anyway. Your premise is that it happened in the District of Columbia. So let's have the District of Columbia regulation. Have you got it?

MR. COTTEN: Yes, sir.

MR. O'NEILL: That regulation reads exactly the same as the Maryland statute.

THE COURT: Which one is it?

MR. COTTEN: 98, your Honor.

THE COURT: I take it that is exactly the same language.

MR. COTTEN: It is, your Honor, but we have case law in the District, and I am prepared to cite it, where the act of negligence of leaving the key in the car, placing the [51]

car in the hands of the party driving it at the time of an accident, occurred in the District of Columbia and the accident in Virginia, the Court ruled it was District of Columbia law that was applicable.

THE COURT: That is right. There is no question about that.

MR. COTTEN: In that case they cited Ross versus Hartman. There is evidence from the policeman that this gentleman left the keys in the car.

THE COURT: What testimony is that?

MR. COTTEN: That this man told the policeman on the day following the accident that he left the keys in the car.

MR. O'NEILL: That is not so. Mr. Gaither didn't recall it but the officer said he might have left the keys in the tail gate. That is the only testimony on that point.

MR. COTTEN: He said he left them in the tail gate. He didn't say he might have. That was our major purpose in bringing the policeman here.

THE COURT: I don't think that would be covered by this regulation. It might be considered an act of negligence in establishing the leaving of keys in the car, but it would not be a violation of this particular regulation.

It might be considered negligence on the part of [52] somebody who left the keys on a table in a room where someone took them. There are many cases in the Court of Appeals dealing with situations where the keys were taken and the question of negligence is involved. If he left them where somebody could get them logic and reasoning might indicate that the keys would be taken. That, of course, is a question of negligence but not of the statute.

MR. COTTEN: You say the removing of the keys applies only to removing them from the ignition, your Honor?

THE COURT: That is right. That is the clear language of the regulation. I still don't exclude it from the case as an act of possible negligence but the only advantage you have here is that we can instruct the jury to the effect that if they find any of the traffic regulations which have been

admitted in evidence have been violated by the driver the fact of the violation is negligence as a matter of law, providing they find that such negligence was the proximate cause of the accident. You don't have the benefit of such an instruction but it still was admitted as evidence of negligence.

MR. COTTEN: As evidence of negligence?

THE COURT: Yes, as evidence of negligence.

MR. COTTEN: That would complete the statutory submission we have.

THE COURT: All right. Do you have any, Mr. O'Neill?

[53] MOTION FOR DIRECTED VERDICT RENEWED

MR. O'NEILL: No, your Honor. I would like to move, while the jury is out, or to renew my motion for directed verdict.

THE COURT: All right. Proceed.

MR. O'NEILL: Your Honor, I maintain as I did after the plaintiff's case that Maryland law applies in this case. I think there is ample case authority for the proposition.

THE COURT: There is no question about that.

MR. O'NEILL: Your Honor, in order for the plaintiff to hold the defendant liable he has to show that, one, the defendant was driving the car, or, two, that his agent was driving the car, or thirdly, this business about the keys, which your Honor has ruled on.

As to those two points, was the defendant driving the car, or his agent, first, from the only positive testimony before your Honor as to the fact the defendant was in counsel's opinion an eye witness at the time of the accident, it would have been impossible for him to have been at the scene of the accident.

I realize in Maryland the driver of a car is prima facie the agent of the owner, unless there is clear and uncontradicted testimony to the contrary, which is what we have in this case – the testimony of the witness Hendricks. I think it is the duty of the Court to direct a verdict for the defendant.

[54] I cite as authority for that a case which your Honor knows only too well, Knight versus Motor Company, which I have here with me. It was before you and you affirmed by the Court of Appeals. You held in that case that only when the agent is driving within the master's business can the master be held liable. The Court of Appeals said – I can point to it immediately – I could if I had time –

THE COURT: You may take time to find it and point to it if you wish.

MR. O'NEILL: Your Honor, the Court said in Maryland the operator of a motor vehicle is prima facie the agent or the servant of the owner but the presumption is rebuttable and when uncontradicted, conclusive evidence is presented which shows the driver was not in the service of the owner it becomes the function of the trial court to declare the owner not liable. They cited ample case authority.

There is no contradiction of the testimony of Mr. Hendricks that Mr. Gaither was in his apartment at the time of the accident. Mr. Gaither has denied that he loaned the car to anyone. There is no testimony at all in plaintiff's case in chief or in rebuttal that the defendant loaned the car or gave it to his agent or authorize an agent to use it. Certainly by the same token there is no testimony that anyone was pursuing Mr. Gaither's business at the time of the accident, at 11:30 in the evening.

[55] Your Honor, I think the Knight case applies here.

There would be one other question which we discussed on the argument when the statutes were sought to be introduced, this buisness of leaving the keys in the car. Taking that situation as adverse to my client as I can, even if he had left the keys in the ignition and there is no testimony that he did, there are ample Maryland cases saying that the theft is the intervening cause – I have cases which hold that.

So, I think taking the plaintiff's cases on each one of the alleged grounds of negligence imputed to the defendant, I think we have overcome the presumption, the rebuttable presumption, and I ask your Honor to direct a verdict for the defendant.

MR. COTTEN: Well, your Honor, in opposition to the motion, there are three prongs which we proceeded on before coming into this Court. First of all, there is no question we have an eye witness.

He refers to a case in which your Honor presided. He included words which prevents it being applied in this particular case. That is the words "uncontradicted testimony." I am not contending that this man was the agent. In Maryland if the owner of the vehicle is in the car he is prima facie responsible and the driver is his agent.

When they speak of uncontradicted evidence, there [56] there is no doubt Mr. Hendricks got on the stand and said between ten and eleven-thirty he was with Mr. Gaither. Of course, this was the only precise time that he could recall. It was also evident from the police officer's testimony that during a three hour interval on at least six separate occasions he attempted to reach Mr. Gaither by telephone. There was also testimony he asked the Metropolitan Police Department to attempt to contact him, which they did and they replied "No answer." That certainly would give the jury a question of fact whether or not Mr. Gaither was driving the car. We feel the evidence is certainly enough to have it submitted to the jury and they could conclude he was driving the car.

This is not a case of uncontradicted testimony. There are several circumstances to be considered, and the witnesses should have their credibility considered.

In taking issue once again with the fact the Maryland law applies, I agree in terms of one of the prongs, that is, if they believe Mr. Gaither was behind the wheel of the car, which we feel they could reasonably do, then Maryland law does apply and the statute which we cited would be appropriate.

If, however, they conclude he was not behind the wheel of the car and they conclude he left the keys in it – the explanation is that he doesn't know what happened to the keys, he remembers locking the car, he doesn't recall anything else, [57] but the policeman does recall his telling him

that he left them in the tail gate – if that were so we would argue that the negligence in this particular instance occurred in the District of Columbia, under the authority of Bowles versus Love which involves the jurisdiction of Virginia. There they said even if the accident occurred in Virginia they applied the law of Ross versus Hartmen in the District of Columbia they said where the negligence occurred in the District of Columbia and the accident itself occurred elsewhere it is the law of the jurisdiction where the negli- occurs that applies. Usually where the accident takes place is where the negligence takes place, but in this particular instance the negligence may have taken place in the District of Columbia, which would make District of Columbia law applicable.

I think these are both issues which should be submitted to the jury and that they could come up with either one of these conclusions, and either one of these conclusions would entitle us to recover.

MR. O'NEILL: Your Honor, I don't deny there have been a few minor contradictions in some of the testimony, but what we are dealing with is first of all whether or not Mr. Gaither was in the car and the only evidence which has not been contradicted in the slightest is that Mr. Gaither was in his partment at the time of the accident.

With regard to the question of agency, the Courts [58] have said the essential elements to be proved are, first, the relationship of master and servant existing between the agent and the owner of the property – no showing of that kind here – and, two, that the servant or agent was acting within the scope of employment or in furtherance of his master's business. No showing of that, not even any showing of who was the driver of the car.

So I think on those two points, whether or not Mr. Gaither was in the car, and whether or not he authorized someone or made someone his agent to use the car, the only thing before your Honor is the uncontradicted evidence of Mr. Gaither and his witness.

On the third point I would like to invite your Honor's attention to the case of Capital Transit versus Joseph Simpson, which say very clearly where the accident occurred in Maryland Maryland law must be applied.

Applying the Maryland law I would invite your Honor's attention to the case of Liberto versus Holseldt, in 155 Atlantic 2nd, 698, a Maryland case, where the Court of Appeals in Maryland held that a thief is an intervening proximate cause, and the owner of the car was not held liable in that case.

There are other Maryland cases along that line, as there are other D.C. cases along the lines of Capital Transit case, holding that where the accident occurred in [59] Maryland Maryland law must be applied. This is not to say that the rules of procedure apply but whether Maryland law applies. I think that is very clear cut and I again ask the Court to direct a verdict in favor of the defendant.

RULING OF THE COURT

THE COURT: I must compliment both of you gentlemen on the manner you have conducted this trial and your citations of law. You both have been very helpful.

As we see it, first of all, considering whether there is any evidence to support the plaintiff's contention that the defendant was driving the car, in our view of the record there isn't any evidence from which the jury could even conjecture or speculate that the defendant was driving.

There was uncontradicted testimony that after he parked the car for the evening that he went to his apartment and remain there all evening except to leave it on one occasion to pick up a newspaper. Mr. Hendricks, his employee, testified that he visited the defendant's apartment during the evening and he was there. There is no evidence to contradict that.

So looking at the evidence as a whole the jury would be left entirely to conjecture and speculation as to whether or not this defendant at the time in question was operating the automobile.

I take it the plaintiff's position is that Mr. [60] Gaither lied when he took the stand and Mr. Hendricks was lying when he took the stand. There is no basis for the Court to permit them to consider that fact.

We have had a case in this Court which went to the Court of Appeals, involving the responsibility law, where we held that despite the fact there was no uncontradicted evidence that there were facts warranting a jury determining the credibility of the defendant in the case, and the Court of Appeals sustained that view. However, the facts and circumstances were different entirely from what they were here. So we unhesitatingly rule that there is no evidence to sustain a theory on which the jury might find that the defendant was the operator of this vehicle.

We come next to the question of whether a servant, agent, or employee of his was operating it. There is no evidence to sustain that whatsoever. We might point out, of course, we do not have the automobile financial responsibility law in Maryland as we have in the District, which puts the burden on the defendant to overcome the presumption that the vehicle was operated with his permission.

The next question is whether or not there is any responsibility on the defendant for his negligence assuming he left the keys in the rear door of the car which were later found by somebody who stole the car.

Assuming that he was careless enough to leave his key there, whoever took the key and stole the automobile, [61] certainly that does not establish the operator or the thief as the agent, servant, or employee of the defendant here, as we understand the law. As counsel has pointed out, there is an intervening fact there which in our view negates any responsibility on the part of the defendant here.

So with these few remarks we must grant the motion for directed verdict. Do you want to bring in the jury, please?

(Whereupon the jury returned to the courtroom)

DIRECTION OF THE VERDICT

THE COURT: Ladies and gentlemen, both sides have rested their respective cases and we are up to the point where all the evidence being in the defendant has made a motion that we direct you ladies and gentlemen to bring in a verdict in favor of the defendant on the ground that the evidence is insufficient to go to you for your consideration and possible verdict; that as a matter of law the evidence is insufficient to warrant consideration of the case by a jury.

We have heard able arguments from respective counsel on this motion and we have concluded that based on all the evidence we must grant that motion. While it is not customary for the Court to go into the reasons why a motion is granted, you might be interested to know briefly our reason for it.

[62] The first question to consider here was whether or not there is any evidence to support the contention that the defendant himself was driving the car at the time of the accident. There is absolutely no evidence of that. The uncontradicted testimony was that the defendant was home in his apartment during the entire evening with the exception of the time when he went out to buy a paper. That is supported by a witness and there is no evidence to the contrary. There is no reason to believe that either or both of these people are lying about the testimony. That is the first point.

The second is whether or not an agent, servant, or employee of the defendant was operating the vehicle which might make him liable for the negligence of such person. There is no evidence that the operator of this vehicle, whoever it may have been, was the agent, servant or employee of the defendant.

Of course, the third point is whether or not, if the defendant left the keys in the tail gate or rear door of this station wagon and it was found by a thief, whether or not under those conditions he would be clearly responsible

if the thief took his car and later was involved in this accident.

Maybe some of you are familiar with the law in the District. We have a different law here from that in Maryland. We have what we call an automobile financial responsibility act which makes the owner of an automobile liable for [63] any negligence resulting in damages to a third person when the automobile is operated by someone other than himself. Unless it can be established that the car was driven without the permission of the owner the law places the responsibility on the defendant to overcome the presumption that the operator of the car was operating it with the permission, consent and knowledge of the owner.

That is not the law in Maryland. The law in Maryland under these circumstances is that the plaintiff has to show that the operator was the agent, servant or employee of the owner or had permission to operate the vehicle. There is no showing of that here.

So based on the facts here the jury would be left entirely to conjecture and speculation as to who was operating this vehicle and that would have to be your first decision in order to render a verdict, and say who was to blame.

So I direct you at this time to bring in a verdict in favor of the defendant. Is that your verdict, so say you all.

ALL JURORS: Yes.

THE COURT: You are now excused to return to the jury lounge. Thank you very much.

(Whereupon the jury was excused.)

MR. O'NEILL: Mr. Cotten and I had some discussion, I can't recall exactly what it was. I would like the [64] Court to rule as to costs. In the way of cost we have the jury demand. We also have the cost of –

THE COURT: Well, you are entitled to all Court costs. There is only the question as to extra costs such as depositions.

MR. O'NEILL: I am not prepared to ask the Court for that but I am asking that the Court rule on the cost of $26.73 transportation to bring the witness from the Norfolk area, Mr. Hendricks.

THE COURT: On what premise?

MR. O'NEILL: It would have been very difficult if not impossible to defend this case without Mr. Hendricks' presence. He was the only person who could place the defendant on the night of the accident. Without him we had no case. Because of the plaintiff's suit we were forced to send to Norfolk and ask him to come to the area. For this we had to advance him $26.73 for transportation.

THE COURT: Mr. Cotten, what do you want to say?

MR. COTTEN: First of all, the presentation of a witness in court is not the only method of introducing testimony. There are written interrogatories, depositions and various methods. Under the D.C. code the most that could be allowed for transportation is a certain pittance per mile; I think it is only within 25 miles in any event, because that is the supboena power of the Court.

[65] The fact they elected to bring in this witness–We would get into a discussion of why he came first class or why he didn't fly and things like that.

THE COURT: I do not feel I can allow it. You could have taken it by deposition, in which case I would have considered it, but under the circumstances we are going to disallow it.

You fellows did a very fine job and I want to compliment you.

(Whereupon the trial was concluded.)

* * *

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 3937

CHARLES R. MYERS and AMERICAN MOTORIST INSURANCE COMPANY, a corporation, APPELLANTS,

v.

FREDERICK O. GAITHER, APPELLEE.

Appeal from the District of Columbia Court of General Sessions

(Argued February 20, 1967 Decided August 10, 1967)

Benjamin W. Cotten, with whom *Albert D. Brault* was on the brief, for appellants.

John J. O'Neill, Jr., with whom *Robert E. Anderson* was on the brief, for appellee.

Before HOOD, Chief Judge, MYERS, Associate Judge, and CAYTON (Chief Judge, Retired).

MYERS, *Associate Judge:* While appellant[1] was driving in Maryland, his car was struck from behind by a speeding automobile which then left the highway and ended in a ditch. He regained control of his car, stopped and went to the other vehicle. No one was behind the wheel, but a set of car keys was still in the ignition. A search for the driver by appellant and others was unsuccessful. By tracing ownership through its District of Columbia license plates, the Maryland police ascertained that the errant vehicle belonged to appellee. Several telephone calls to the number listed in appellee's name elicited no response. The District police were then requested to contact appellee, but they, too, were unable to reach him. Although the accident occurred about 11:30 p.m., and ownership of the auto was ascertained within an hour, it was not until about 3:30 a.m., after repeated telephone

[1] Since appellant American Motorist Insurance Company is here involved only through its right of subrogation, "appellant" will be used in the singular and will refer only to appellant Myers.

calls, that the Maryland police succeeded in contacting appellee. Upon being informed of the accident, he indicated that, as far as he was aware, his car was still parked in front of his home where he had left it earlier in the evening. He could give no explanation for its presence in Maryland or its involvement in the accident. When appellee reclaimed his impounded car the next day, he again denied any personal connection with the accident, but admitted that the keys found in the car belonged to him and that he had used them the previous afternoon.

On essentially these facts, at the close of all the testimony, the trial judge directed a verdict in favor of appellee on the ground that "the jury would be left entirely to conjecture and speculation as to who was operating [the] vehicle" at the time of the accident. This appeal ensued.

Appellant advances two alternative theories to establish appellee's liability: first, either that appellee was in fact driving his automobile at the time of the accident or it was being driven by some other person with his knowledge and consent; or, second, that appellee, in violation of the traffic regulations, had left his car keys in the vehicle—that this violation was negligence, which permitted someone to steal the car, and that appellee is therefore liable for the consequences of his omission of care.

I

The first theory predicates liability upon a presumption that the operator of a motor vehicle was driving it with the owner's consent and is therefore deemed to be the agent of the owner. The presumption has been imposed by case law in Maryland. In *Wagner* v. *Page*, 179 Md. 465, 20 A.2d 164, 166 (1941), it was stated that "the operator of a motor vehicle is *prima facie* the agent and servant of its owner, but the presumption is a rebuttable one." *See also* cases collected at 20 A.2d at 166. In the District of Columbia this presumption is a statutory one. D.C. Code § 40-424 (1961) provides that

> Whenever any motor vehicle . . . shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed to be the agent of the owner of such motor vehicle,

> and the proof of the ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner.

As a rule of evidence pertaining to the remedy, we apply the presumption as stated in § 40-424 and construed in the cases interpreting that section.[2]

This presumption may be overcome by the uncontradicted denial by the owner. *Rosenberg* v. *Murray*, 73 App.D.C. 67, 116 F.2d 552 (1940). In such a case, a directed verdict is proper. However, in *Hiscox* v. *Jackson*, 75 U.S.App.D.C. 293, 294, 127 F.2d 160, 161 (1942), it was held that where the infirmities in the owner's own evidence contradict his denials, a directed verdict is no longer proper. To entitle the defendant to a directed verdict there must be "evidence which destroys all inferences and presumptions supporting plaintiff and which raises no

[2] The dissent states that we err in considering § 40-424 in our disposition of this case—that this constitutes an extraterritorial application of the section in contravention of *obiter dicta* contained in *Knight* v. *Handley Motor Co.*, D.C.App., 198 A.2d 747 (1964). *Knight* only discussed whether the District presumption of the agency relationship could be applied to a cause of action arising in another jurisdiction. It did not concern the evidentiary standards to be applied when such a presumption is interjected into the case by the jurisdiction in which the cause of action arose.

The evidentiary clause of § 40-424 (and the clause not discussed in *Knight*) provides that "the proof of ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner." This clause is a rule of evidence created by statute. The application of such a rule "to the trial of a cause of action arising in another state . . . does not operate to give the statute an extraterritorial effect." 15A C.J.S. *Conflict of Laws* § 22(9). In *Pennsylvania Co.* v. *McCann*, 54 Ohio St. 10, 42 N.E. 768 (1896), a statute declaring mechanical defects in railroad equipment prima facie evidence of negligence was applied to an Ohio action, even though the accident had occurred in Pennsylvania. The court stated:

> No extraterritorial effect is given to a statute creating a rule of evidence by the fact that the rule is applied to the trial of a cause of action arising in another state. If the tribunal of a state obtains jurisdiction of the parties and the cause, it will conduct the investigation of the facts in controversy between them according to its own rules of evidence, which is, simply, to follow its own laws within its borders. 42 N.E. at 769. *See also Menard* v. *Goltra*, 328 Mo. 368, 40 S.W.2d 1053 (1931).

Federal courts have also followed this rule when asked to apply a state evidentiary presumption, *United Airlines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); *Lobel* v. *American Airlines, Inc.*, 192 F.2d 217 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952), or following the federal rules when dealing with a foreign national or foreign claim, *Société Internationale Pour Participations Industrielles et Commerciales* v. *McGranery*, 111 F. Supp. 435, 444, 14 F.R.D. 44, 53 (D.D.C. 1953), *modified*, 96 U.S.App. D.C. 232, 225 F.2d 532 (1955), *cert. denied*, 350 U.S. 397, *rehearing denied*, 350 U.S. 976 (1956).

doubts against defendant." In reversing a directed verdict for the owner, the court found that there were "inconsistencies and self-contradictions . . . [necessarily leaving] some doubts as to the absolute credibility of the witnesses." A jury determination was therefore in order. *See also Conrad* v. *Porter,* D.C.Mun.App., 79 A.2d 777 (1951), *aff'd,* 90 U.S.App.D.C. 423, 196 F.2d 240 (1952); *Simon* v. *Dew,* D.C.Mun.App., 91 A.2d 214 (1952).

Appellant asserts there were inconsistencies and contradictions in appellee's own evidence which entitled him to have his case submitted to the jury. He points out, for example, that although appellee testified he had been home all evening, had retired shortly before midnight, and normally had no difficulty hearing the ring of the telephone, numerous phone calls to his residence over a three-hour period immediately after the accident were not answered. The jury, appellant contends, may well have concluded that appellee was not at home until nearly 3:30 a.m. —that he was therefore either driving his automobile at the time of the accident, or at least was untruthful in his account of his whereabouts. Appellant also asks us to note that in a deposition taken more than four years after the accident appellee could not recall his activities on the night of the accident. However, at trial appellee was precise in his recollection that he had been visited about 10 p.m. by a Mr. Hendricks, one of his employees, and that they had watched television together until after eleven o'clock. Mr. Hendricks similarly testified that he had visited appellee and had not left until about 11:30 p.m. Appellant maintains that such a discrepancy between the deposition and the testimony at trial could reasonably be viewed by a jury as a deliberate fabrication—or, at the least, as indicative of a faulty memory. Appellant further argues that a jury might well have believed that appellee was trying to buttress his story that his auto was stolen when he testified that garden tools worth about $500, which had been in the back of his car, were missing when he went to reclaim it the following day. In varying degrees, this was contradicted by appellant, the officer, and even Hendricks, appellee's own witness. These and other inconsistencies, appellant reasons, precluded a directed verdict in favor of appellee and required the submission of the case to the jury.

Appellee counters appellant's argument by maintaining that his evidence was not inherently improbable or im-

peached and should therefore control. *Stone* v. *Stone,* 78 U.S.App.D.C. 5, 136 F.2d 761 (1943); *Perlman* v. *Chal-Bro., Inc.,* D.C.Mun.App., 43 A.2d 755 (1945). Whether impeachment, once attempted, is successful is essentially a question for the jury, *Baltimore & O. R. R.* v. *Corbin,* 73 App.D.C. 124, 118 F.2d 9 (1940), and whether appellee's evidence is uncontradicted as a matter of law must also be determined from inferences contrary to appellee's position but reasonable in the light of other evidence. *Bruni* v. *Dulles,* 121 F.Supp. 601, 603 (D.D.C. 1954), *rev'd on other grounds,* 98 U.S.App.D.C. 358, 235 F.2d 855 (1956).

The factual possibilities reasonably inferred from appellant's evidence, combined with minor contradictions and possible impeachment of appellee's testimony, bring this case within *Farrall* v. *Ellis,* D.C.Mun.App., 157 A.2d 127 (1960). There the owner testified he had lent his car to his brother from whom it was stolen. We reversed a directed verdict for the owner, holding that if the proof offered by the owner contained inconsistencies and self-contradictions raising doubt as to the owner's credibility or that of his witnesses, the issue of permissive use of the automobile was one for the jury. We characterized the explanation of the owner as perhaps "absolutely true, but we [did] not think it [possessed] such 'absolute credibility' that a jury would be bound as a matter of law to accept it." For the same reasons, we believe appellant in the present case was entitled to have a jury determination of his claims.

II

At trial a Maryland police officer testified that appellee, when he reclaimed his car, stated he had locked the ignition and the doors to his station wagon but must have left the keys in the tailgate, which enabled some unauthorized person to take the car. Appellee denied any recollection of having made this statement.

On the basis of the admission attributed to appellee, that he must have left the keys in the tailgate, appellant predicates his second theory of appellee's liability—his violation of Art. XIV, § 98, of the Traffic and Motor Vehicle Regulations of the District of Columbia, which provides:

> No person driving, or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway.

The trial judge refused to admit the regulation on the ground it was not supported by the evidence and that any conclusion reached as a result of considering the facts in the light of this regulation would be speculative. On the contrary, given the presence of the key in the car, if appellee's evidence concerning his whereabouts should have been believed by the jury, the explanation offered by appellee, as testified to by the officer, furnishes the only non-speculative version of how the automobile became involved in the accident in Maryland. The question of whether appellee left his keys in the tailgate was properly for the jury.

The trial judge also ruled that § 98 would be inapplicable as the regulation demands only the removal of the key from the ignition. The plain language of the regulation lists a number of operations to be performed when leaving the car unattended: stopping the engine, locking the ignition, setting the brake. "Removing the key" logically means to remove the key completely from the car[3] so as to thwart the nefarious activities of any person tempted to steal it because of the easy accessibility of the key. The regulation was primarily intended for the protection of the public.[4] To say that it demands the removal of the key only from the ignition but not from the car doors, tailgate or any other visible position in the car would not only defeat the objective of the regulation but would be a distorted statutory construction. Clearly § 98 was relevant and should have been admitted.

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[3] In discussing a Maryland regulation, virtually identical to § 98, the Maryland Court of Appeals in *Hochschild, Kohn & Co.* v. *Canoles*, 66 A.2d 780, 783 (1949), stated that the protection of the public

> was to be accomplished not only by turning off the motor and locking the ignition and *taking the key away*, which would make it difficult for anyone except a mechanic to start the car . . . . [Emphasis added.]

[4] *Ross* v. *Hartman*, 78 U.S.App.D.C. 217, 139 F.2d 14 (1943), *cert. denied*, 321 U.S. 790 (1944); *Schaff* v. *E. W. Claxton, Inc.*, 79 U.S.App.D.C. 207, 144 F.2d 532 (1944); *Bullock* v. *Dahlstrom*, D.C.Mun.App., 46 A.2d 370 (1946).

III

Although both Maryland and the District of Columbia hold that violation of a safety regulation presents a prima facie case of negligence,[5] Maryland requires the plaintiff to establish, in addition to such violation, that the breach of duty has not been interrupted by a break in the chain of causation. *Liberto* v. *Holfeldt*, 145 Md. 62, 155 A.2d 698 (1959). In applying Maryland law to a similar factual pattern, a federal court has indicated that *Liberto* demonstrated the view that "the intervening actions of a thief break the causal chain, leaving neither foreseeability nor proximate cause for jury determination." *McAllister* v. *Driever*, 318 F.2d 513, 517 n. 1 (4th Cir. 1963). Therefore, if Maryland law applies, the trial judge was correct in withholding from the jury appellant's theory that appellee's failure to properly secure his car as required by § 98 made him liable for the damages arising from the accident.

An opposite view is followed in this jurisdiction. *Ross* v. *Hartman*, 78 U.S.App.D.C. 217, 139 F.2d 14 (1943), *cert. denied*, 321 U.S. 790 (1944), expressly overruled the local equivalent of the Maryland rule, stating:

> Violation of an ordinance intended to promote safety is negligence. If by creating the hazard which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm. This comes only to saying that in such circumstances the law has no reason to ignore and does not ignore the causal relation which obviously exists in fact. . . .
>
> This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent.[6]

Only in special or peculiar circumstances would such negligence not be a proximate cause of the injury as a matter of law. If the District of Columbia law is applicable in the present case, the trial judge clearly erred in refusing to permit the jury to consider this theory of liability.

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[5] *Kelley* v. *Huber Baking Co.*, 145 Md. 321, 125 A. 782 (1924), and cases cited therein; *Ross* v. *Hartman*, *supra* note 4, and cases cited therein.

[6] 78 U.S.App.D.C. at 218, 139 F.2d at 15 [citations omitted]. *See also Schaff* v. *R. W. Claxton, Inc.*, *supra* note 4; *Roberts* v. *Lane*, D.C.Mun.App., 115 A.2d 517 (1955); *Bullock* v. *Dahlstrom*, *supra* note 4.

IV

The critical question then becomes: Does the law of Maryland or that of the District of Columbia apply to this case?

Appellee urges the traditional application of *lex loci delictus,* the law of Maryland where the injury occurred. We have previously acquiesced in this application. *Miller & Long Co.* v. *Shaw,* D.C.App., 204 A.2d 697 (1964); *Knight* v. *Handley Motor Co.,* D.C.App., 198 A.2d 747 (1964); *Lehman* v. *Great Atlantic & Pacific Tea Co.,* D.C. Mun.App., 136 A.2d 397 (1957). *See also Miller* v. *Pennsylvania R. R. Co.,* 102 U.S.App.D.C. 135, 251 F.2d 376 (1957); *Ott* v. *Washington Gas Light Co.,* 205 F.Supp. 815 (D.D.C. 1962), *aff'd sub nom., J. H. DeVeau & Son, Inc.* v. *Ott,* 115 U.S.App.D.C. 74, 317 F.2d 138 (1963).

In recent years various jurisdictions have applied a "contact" or "grouping of contacts" theory when faced with a conflict between the law of the forum and the law of the place of injury. *See, e.g., Babcock* v. *Jackson,* 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); *Kilberg* v. *Northeast Airlines, Inc.,* 9 N.Y.2d 34, 211 N.Y.S. 2d 133, 172 N.E.2d 526 (1961); *Griffith* v. *United Air Lines, Inc.,* 416 Pa. 1, 203 A.2d 796 (1964). The Supreme Court has recognized that a strict rule of *lex loci* is not infrequently inadequate. In *Richards* v. *United States,* 369 U.S. 1, 11-13 (1962), an action under the Federal Tort Claims Act, where the negligence occurred in one state and resulted in death in another state, the Court held:

> The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties. . . . Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inap-

> propriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach . . . . [Citations omitted.]

The Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 9, 1964) considers as important contacts, *inter alia,* the place of the injury, the place where the conduct occurred, the domicile of the parties, the place where the relationship between the parties is centered. In determining relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states. *See also Vanston Bondholders Protective Comm.* v. *Green,* 329 U.S. 156, 162 (1946), where it was stated:

> Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.

There has been some recent case treatment of the contacts theory in this jurisdiction. The United States Court of Appeals for the District of Columbia in *Tramontana* v. *S. A. Empresa de Viacao Aerea Rio Grandense,* 121 U.S. App.D.C. 338, 350 F.2d 468 (1965), *cert. denied sub nom., Tramontana* v. *Varig Airlines,* 383 U.S. 943 (1966), limited an airline's liability to survivor of decedent to the amount stated in a Brazilian statute on the ground that Brazil had contacts (domicile of corporate defendant, place of injury, wrongful death act creating the right of recovery relied upon, valid Brazilian interest in limiting recovery) superior to those of the District of Columbia (choice of forum, secondary place of business for corporate defendant—plaintiff was a Maryland resident[7]). In *Williams* v. *Rawlings Truck Line, Inc.,* 123 U.S.App.D.C. 121, 357 F.2d 581 (1965), the same appellate court adopted a New York rule of estoppel fixing liability upon an automobile owner of record when he failed to register a change in title, although the District of Columbia, where the injury took place, follows a contrary rule. The opinion characterized

[7] *Cf. Armiger* v. *Real Transportes Aereos,* U.S.App.D.C. , F.2d (April 13, 1967), where, although a survivor was a District of Columbia resident, Brazil's interest was considered vital enough to compel a similar result.

the case as a "classic false conflicts situation," observing that New York policies would be thwarted by refusal to apply the New York estoppel rule but that no District policies would be weakened by its application. Recently that court in *Roscoe* v. *Roscoe,* U.S.App.D.C. , F.2d (decided April 14, 1967), refused to apply the District interspousal immunity rule, applying instead the law of North Carolina, the situs of the accident. It observed that the Supreme Court in *Richards* v. *United States,* 369 U.S. 1 (1962), deemed it desirable to preserve flexibility in the choice of law "since there may be situations where the application of the older rule 'might appear inappropriate or inequitable.'"

The high incidence of auto thefts in the District of Columbia,[8] the constant warnings to the public to remove keys to prevent such thefts, the frequency of high speed chases involving stolen motor vehicles, all persuade us that the District has an overriding interest in preventing such occurrences and in encouraging owners to exercise greater caution in parking their automobiles. The only contacts this case discloses which are purely Maryland are the domicile of the appellant and the location of the accident—referred to in the *Kilberg* case as merely "fortuitous"; while the District's contacts are domicile of the appellee, the situs of the original or primary negligence, the chosen forum, and the overriding public interest in proscribing the conduct here alleged—which contacts are indeed superior to those of any other jurisdiction. We hold that the District of Columbia law on questions of negligence and proximate cause should be applied in this case.

Reversed with directions to grant a new trial consistent with this opinion.

HOOD, *Chief Judge,* dissenting: I cannot agree that Section 40-424 of the District of Columbia Code has any application to this case which concerns an automobile collision that occurred in Maryland. Section 40-424, a part of the Motor Vehicle Safety Responsibility Act of the District of Columbia, by its express terms applies only to situations where a motor vehicle is "operated upon the

[8] Report of the President's Commission on Crime in the District of Columbia 97-103 (1966) states that over 5,000 automobiles are stolen every year in this jurisdiction; in almost 20 per cent of the thefts, car keys had been left in the autos stolen.

public highways of the District of Columbia." In my opinion the statute has no application to an accident occurring outside the District of Columbia. Indeed, I thought this had been settled in *Knight* v. *Handley Motor Company, Inc.*, D.C.App., 198 A.2d 747, 750 (1964), where this court, speaking through Judge Myers, held that this same Code Section has no extraterritorial effect, saying: "The statutory language definitely applies the agency presumption only to the District."

The majority opinion says it is applying only the evidentiary clause of Section 40-424. I think it misconstrues the purpose of the section. Its purpose was to create a new liability by making the owner of a motor vehicle responsible for its operation whenever operated with the consent of the owner. This was a change of substantive law. There has been no such change in Maryland where the law still is that the "mere fact that the owner has given permission to the driver to use his car is not enough to make him liable." *State* v. *Walker*, 230 Md. 133, 186 A.2d 472, 473-74 (1962). What the majority calls the "evidentiary clause" of Section 40-424 is an essential part of the Section for proving the vital issue of consent and is not a general rule of evidence.

I agree that in a trial in this jurisdiction our rules of evidence apply even though the accident occurred beyond this jurisdiction, but the controlling substantive law is that of the place where the accident occurred. *See Molinaro* v. *Scott Brothers, Inc.*, 97 U.S.App.D.C. 199, 229 F.2d 773 (1955). Our general rule of evidence applicable here was established long before the enactment of Section 40-424. In *Curry* v. *Stevenson*, 58 App. D.C. 162, 163, 26 F.2d 534, 535 (1928), it was said:

> It has come to be the general rule that, in an action for injuries resulting from being struck by an automobile, proof that the automobile was owned by the defendant at the time of the accident establishes a prima facie case for the plaintiff. In other words, proof of defendant's ownership of an automobile that has been driven on the public highway warrants the inference that it was in his possession, either personally or through his servant, the driver, and that the driver was acting within the scope of his employment.

The same general rule applies in Maryland. *See Hoerr* v. *Hanline*, 219 Md. 413, 149 A.2d 378, 381 (1959), where it was said that "there was a presumption that whoever was driving the truck was the agent, servant or employee of its owner acting within the scope of his employment." Thus there is no conflict between the general rule of evidence in Maryland and the District, and if the majority opinion had placed its reliance on the general rule, perhaps I could agree that appellant's prima facie case was not overcome as a matter of law by uncontradicted and conclusive evidence. I cannot, however, agree that our Code Section 40-424 has any application to this case.[1]

With respect to the second theory of liability, the majority opinion concedes that even if appellee were negligent in not removing the car keys, there could be no recovery under Maryland law. It seeks to apply District of Columbia law because, it says, the case has more important contacts with the District. The accident occurred in Maryland and a resident of Maryland was the injured party. I know of no more important contacts. This is no case for "choice of law." We should follow our previous decisions and apply Maryland law. If the majority opinion stands, the trial court hereafter in every case claiming negligence in another jurisdiction will be faced with the question of what law is applicable, and will have no definite guidelines to answer the question. Incidentally, it may be noted that only recently Maryland has rejected the choice of law rule. *See White* v. *King*, 244 Md. 348, 223 A.2d 763 (1966).

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[1] Even if Section 40-424 had any application here, it could not come into play until there had been a determination that appellee was not the driver of his automobile, because this section applies only when the motor vehicle is operated "by any person other than the owner." See Judge Myers' dissent in *Joyner* v. *Holland*, D.C.App., 212 A.2d 541 (1965).

Thursday, August 10, 1967

The Court met pursuant to adjournment. Before: The Honorable Andrew M. Hood, Chief Judge.

* * *

Before: Hood, Chief Judge, Myers, Associate Judge, and Cayton (Chief Judge, Retired).

CHARLES R. MYERS and AMERICAN MOTORISTS INSURANCE COMPANY, A CORPORATION,

Appellants,

v.

FREDERICK O. GAITHER,

Appellee.

No. 3937 January Term, 1967

Appeal from the District of Columbia Court of General Sessions. This cause came on to be heard on the transcript of the record from the District of Columbia Court of General Sessions, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of said Court, in this cause, be and the same is hereby reversed with costs, and that said cause be and it hereby is remanded to the said District of Columbia Court of General Sessions with directions to grant a new trial consistent with the opinion in this cause.

Frank H. Myers,
Associate Judge.

Dissenting Opinion by:

Andrew M. Hood,
Chief Judge.

August 10, 1967.

* * *

[Filed December 5, 1967]

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 21,247 September Term, 1967
D.C.C.A. No. 3937

Frederick O. Gaither,

Petitioner,

v.

Charles R. Myers and
American Motorist Insurance Co.,
A Corporation,

Respondents.

BEFORE: Bazelon, Chief Judge; and
McGowan and Robinson,
Circuit Judges, in Chambers.

ORDER

On consideration of petitioner's petition for the allowance of an appeal from the judgment of the District Court of Appeals, of petitioner's brief in support thereof and of respondents' brief in opposition thereto, it is

ORDERED by the Court that the aforesaid petition be granted and petitioner is allowed to prosecute his appeal from the judgment of the District of Columbia Court of Appeals in case No. 3937.

Per Curiam.

Circuit Judge McGowan did not participate in the foregoing order.

BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,247

FREDERICK O. GAITHER, *Appellant*,

v.

CHARLES R. MYERS
and
AMERICAN MOTORISTS INSURANCE COMPANY,
A Corporation, *Appellees*.

Appeal From the District of Columbia Court of Appeals

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STATEMENT OF QUESTIONS PRESENTED

The Appellees feel that the question presented is whether the District of Columbia Court of Appeals erred in reversing the verdict directed by the trial court in favor of the appellant.

INDEX

CITATIONS

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Appeal From the District of Columbia Court of Appeals

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This was a suit sounding in negligence, brought to recover for property damages sustained in an automobile accident. The plaintiffs at the trial level were the owner of the automobile, Charles R. Myers, and his collision insurance carrier, American Motorists Insurance Company. The

appellant here, Frederick O. Gaither, was the owner of the one other automobile involved. There was no question as to the ownership of the vehicle or damages.

The accident occurred on the night of June 22, 1960 on Maryland Route 4. The Myer vehicle was struck from the rear by a vehicle which went off the road to the left and swerved back to the right side of the road where it came to a stop some 960 feet from the point of impact. (JA 16) After the accident, the striking vehicle, later identified as the Gaither vehicle, came to rest and was not driveable. (JA 20) The accident occurred shortly before 11:30 p.m. and the investigating police officer arrived on the scene shortly thereafter. (JA 16) A search was made for the driver of the Gaither vehicle, but no one was found. (JA 17) The keys were found in the ignition of the Gaither vehicle and this set of keys was the same set that Mr. Gaither had been using earlier that day. (JA 5)

Suit was filed by the appellees, (JA 1) and the matter came on before Judge Malloy and a properly impaneled jury.

The appellees called the appellant, Frederick O. Gaither as an adverse witness. Mr. Gaither testified that the keys found in the motor vehicle were his keys and were in fact the keys that he had been using to operate his car earlier that day. (JA 5) He testified that on the day of June 22, 1960, he had parked his automobile on the public street in the 2400 block of "L" Street in Northwest Washington, D. C. (JA 6) He testified that he had two separate rings or sets of keys. One of these sets was for the car and one for his residence. On the key ring of the car, he had an ignition key and a key for the doors and tailgate. He testified that he had left several tools and other items in the back of his car which was a stationwagon. (JA 7) He testified that he recalled locking the automobile, but he does not recall what he did with the keys. (JA 8)

Mr. Gaither testified that on the evening of June 22nd he had been home all evening, except for a possible trip to the drug store, and that he saw three people who had either dropped by or whom he visited. One of the people whom he claims he saw did not testify, and another gentleman was deceased. (JA 9, 10) He further testified that Mr. Hendricks, an employee of his at that time, stopped by and was watching television with him between 10:00 and 11:30 p.m. (JA 10) He had not testified as to any of these people in his deposition that had been taken a year earlier. Appellees' counsel impeaced Mr. Gaither with his deposition in this regard. (JA 10-12)

Mr. Gaither testified that he went to bed sometime between 12:00 and 1:00 and was awakened sometime later by a call from the Prince George's County Police advising that his car had been involved in an accident. He also stated that he was not hard of hearing and does not ordinarily have any trouble hearing the telephone. (JA 14)

He then stated that the next day he went to retrieve his car and that Mr. Hendricks went with him. He stated that he did not have any conversation concerning his keys when he went to retrieve his car. (JA 14) He also stated that there was no property in the automobile, with the exception of a little briefcase.

The appellees next presented Officer Rash, Corporal on the Prince George's County Police Force, who had been the investigating police officer. (JA 15) Officer Rash testified that he arrived on the scene shortly after the accident and found a set of keys in the ignition of the stationwagon and tools such as garden equipment, shovels, etc. and a briefcase with some checkbooks and personal belongings of one, Frederick O. Gaither III. (JA 16, 18)

Officer Rash testified that an unsuccessful search had been made to locate the driver of the vehicle. (JA 17) He then testified that he had determined the ownership of

the vehicle at approximately 12:30 a.m., and that he then commenced attempts to contact Mr. Gaither. The attempts consisted of calling Mr. Gaither's home several times and requesting Metropolitan Police to go by his home and contact him. (JA 17) The Metropolitan Police Department advised him that they were unable to raise anyone at that address and it was not until 3:30 a.m., (June 23rd) that Mr. Gaither was reached at his home. (JA 18) Mr. Gaither did not give any explanation as to how his vehicle came to be in Maryland.

Corporal Rash testified that the following day he met with Mr. Gaither at which time Mr. Gaither signed a property release for the briefcase and the personal checkbooks. Officer Rash stated that during a conversation between himself and Mr. Gaither, Mr. Gaither indicated that he must have left the keys in the tailgate when he was locking it. (JA 18, 19) Upon cross-examination, by appellant's counsel, it was established that there were several pieces of equipment in the Gaither vehicle and that Mr. Gaither never commented on any "missing tools". (JA 20)

The appellees then rested their case, other than submission of traffic regulations—that they deemed appropriate. The defendant moved for a directed verdict, which was denied at that time. (JA 22)

The appellant then called Mr. Hendricks to the stand. He testified that he had stopped by Mr. Gaither's home on the evening of the 22nd about 10:00 p.m. He stated that they watched a television program and he left around 11:30 p.m. (JA 23) Mr. Hendricks stated that he went with Mr. Gaither the next day to pick up his car. He stated that at that time, the rear of the stationwagon was empty. (JA 24)

On cross-examination, it was established that Mr. Hendricks did not recall the time that Mr. Gaither had supposedly called him about the accident, did not recall the

program he supposedly watched and was present during, but did not recall, any conversation between Mr. Gaither and the police officer. (JA 24, 25) Mr. Hendricks further testified that although he had been out of the area, he had lived at the same address since leaving the area and had been in constant contact with Mr. Gaither since that time. He further testified that Mr. Gaither knew his address in Virginia and in fact had visited him there. (JA 26)

The appellant rested his case. The appellees put Mr. Gaither back on for rebuttal testimony. (JA 28) At this time, Mr. Gaither was questioned concerning the fact that during his deposition, Mr. Gaither testified that he did not know where Mr. Hendricks was. (JA 29)

Various traffic regulations were offered by the appellees. Both the Maryland and District of Columbia traffic regulations dealing with leaving a motor vehicle unattended, Section 247 and Section 98 respectively, were refused admittance into evidence. (JA 34, 35 & 36)

Appellant's motion for a directed verdict was then renewed, (JA 28, 36) and after argument, the motion was granted. (JA 41)

An appeal to the District of Columbia Court of Appeals by the appellees followed. (JA 4) The District of Columbia Court of Appeals reversed the decision of the trial court and ordered a new trial. (JA 54, 57) The decision to reverse was not unanimous.

The appellant filed a petition which was granted and the appeal to this Court was the result.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals did not err in reversing the Trial Court for directing a verdict against the appellees. Assuming arguendo that the arguments that were raised by appellant concerning the application of

Title 40, Section 424, District of Columbia Code (1961 Edition) and the use or application of the "grouping of contacts" theory are correct, the District of Columbia Court of Appeals was still correct in ordering a new trial.

The cardinal question that pervades both the case and appellant's arguments for reversal of the District of Columbia Court of Appeals is whether there was a conflicts of laws situation and an incorrect treatment of same. The geographical area involved encompasses the two jurisdictions of the State of Maryland and the District of Columbia, but is within the ecological area known as the Greater Metropolitan Washington Area.

The appellees advanced two alternative theories of liability. The first theory was a two-pronged one, asserting that when the accident occurred in Maryland, either Mr. Gaither or his servant, agent or employee, with his knowledge and consent, was operating his vehicle. The alternative theory was that Mr. Gaither had negligently left his keys in his automobile and that this was a proximate cause of the accident.

Under the first theory advanced by the appellees, the place of the wrong and the place of the injury would have been in Maryland. In Maryland, the operator of the motor vehicle is *prima facie* the agent, servant or employee of the owner. This is a rebuttable presumption. At the trial level, Mr. Gaither attempted to rebut this presumption through his testimony and that of Mr. Hendricks.

The Trial Court found *as a matter of law* that this presumption was rebutted and did so on the basis that the appellant's testimony was uncontradicted. The Court further argued that there was no reason to believe that either or both, Mr. Gaither or Mr. Hendricks were lying. The Court thus pre-empted the function of the jury on the question of the credibility of the witnesses and the weight of the evidence. Inasmuch as there was conflicting testi-

mony and inconsistent statements and contradictory evidence, the Court was in error and the District of Columbia Court of Appeals was eminently correct in holding that a jury determination was in order.

Under the alternative theory of liability, there was a difference as to the place of the injury and the place of the wrong. The act involved in the instant case, which comprised the alternative theory of liability was the negligent leaving of the keys in his motor vehicle by Mr. Gaither. This act took place within the District of Columbia and would have therefore been guided by the District of Columbia Traffic Regulations; namely, Section 98 which proscribes the leaving of the keys in an automobile at a time when it is unattended.

The appellees sought admission of Section 98 and this admission was denied when the Trial Judge interpreted the regulation as requiring *only* that the key be removed from the ignition, rather than the car. The District of Columbia Court of Appeals correctly ruled that this traffic regulation, enacted to control conduct upon its public streets should have been admitted. Even without the benefit of the traffic regulation, the jury should have been allowed to consider as a possible element of negligence the question of the leaving of the keys in the motor vehicle. Thus under either theory or approach advanced by the appellees, the Trial Court should have not directed the verdict, and the District of Columbia Court of Appeals was correct in reversing and ordering a new trial.

ARGUMENT

I

One cannot approach this case without remembering Sir Francis Bacon's observation:

> "Men suppose their reason has command over their words; still it happens that words in return exercise authority on reason."

The traditional conflicts doctrine in tort actions is *Lex Loci Delictus*. Having said this, one could be beguiled into thinking that one had said enough. In this case, it is essential that this phrase be probed and explored. The meaning of the words in this doctrine is perhaps the touchstone of decision in this matter. One noted lexicographer defines the phrase as follows:

> "*Lex Loci Delictus*—The law of the place where the crime or wrong took place. More fully expressed by the words *Lex Loci Delicti Commissi* (Law of the place where a tort is committed), usually written more briefly as *Lex Loci Delicti* or sometimes simply *Lex Delicti*.
>
> *Black's Law Dictionary, Fourth Edition, with Guide to Pronunciations.* p. 1056

Before we can determine *where* the place of the wrong is, you would have to decide *what* the wrong is.

The same source gives several definitions, or descriptions if you will, of the word "tort". In many instances, an act per se can constitute the wrong, but in negligence, there are two ingredients; one, an act which constitutes a breach of a duty owed and; two, some injury resulting from such breach. In most instances, involving automobile negligence, the breach of a duty and the injury occur within congruent geographical and jurisdictional confines. The first of the alternative theories of liability advanced by the appellees had the act *and* the injury occurring in Maryland. It is contended that under this theory semantics does not play a significant part in reaching a decision.

There was no dispute as to the ownership by Mr. Gaither of the striking vehicle. If Mr. Gaither was driving the automobile, then he would obviously have been responsible for his own negligent acts. If someone other than Mr. Gaither was operating the vehicle, then there is a presumption imposed by case law in Maryland, that this operator was driving it with the owner's knowledge and consent;

and was therefore the agent of the owner. *Wagner* v. *Page*, 179 Md. 465, 20 A. 2d 164 (1941). It was stated there that "The operator of a motor vehicle is *prima facie* the agent and servant of its owner, but the presumption is a rebuttable one." (See also cases collected at 20 A. 2d 166.)

Mr. Gaither attempted to rebut the presumption through his story and through the testimony of Mr. Hendricks. Mr. Gaither testified that the keys found in the automobile were his and were the same set of keys he had used to operate the car earlier that day. His recollection was that he locked the car, *but he was not sure what he did with the keys.* It is noteworthy, especially when weighed against later testimony from the investigating police officer, that Mr. Gaither was the one who first and voluntarily mentioned the need of a key for the tailgate of his car which was a stationwagon. Mr. Gaither further stated that his automobile was the type that had to be locked with a key; that he did not recall what he did with the keys after he supposedly locked the car; and that there was no way that the keys to his automobile could be identified or specifically related, to his automobile. The Court is respectfully referred to JA 6, 8 and 9 in general and the certain portions of the testimony set out below:

> "Q: When you parked the car, what then did you do?
>
> A: I took the keys, with this 1958 model, *you have to operate the tailgate to secure the car by turning the key in the tailgate.*" (JA 6) (Emphasis supplied.) . . .
>
> "Q: Was this automobile the type that you had to lock with a key, or could you depress the lock?
>
> A: Oh no, you locked it with a key.
>
> Q: Would the same key that locked the door, lock the gate?
>
> A: Well, I think so. I know one key had to be used for the tailgate." (JA 8) . . .

"Q: Do you know whether or not you put the keys anywhere after you locked the automobile, or what you did with the keys?

A: Well, I would normally put them back in my pocket.

Q: Do you recall putting them in your pocket on this particular date?

A: *I don't recall putting them in my pocket.* It would be impossible for me to recall that in 1960." (JA 8) ... (Emphasis supplied) ...

"Q: Was there any way you could identify this particular set of keys that you have characterized as your set of ignition keys and the keys with which you locked the automobile? In other words, you could identify them as to either pair of keys—was that the case?

A: They were not in a case. There were two keys on a chain.

Q: Was there anything else on this chain?

A: No. Not that I remember." (JA 9)

Mr. Gaither attempted to explain that he could not have been driving the car by contending that he had encountered three separate people on the evening in question and during the crucial time period. One of these individuals did not testify and another was deceased. Mr. Gaither testified that Mr. Hendricks, an employee of his at that time, visited him between 10:00 p.m. and 11:30 p.m. *This was the first time that there had been any mention of witnesses as to his whereabouts in the evening.* The Court is respectfully referred to JA 10-12 for the exchange on this point.

The Court is also respectfully referred to JA 28, 29 which concerns the testimony of Mr. Gaither, that he did not know where Mr. Hendricks lived or what his address was until after the deposition. His testimony was contrary to that of Mr. Hendricks, who had testified that Mr. Gaither had visited him in Virginia where he had lived since leaving

the Washington Area in 1962 and that he has had the same address ever since he left. Mr. Hendricks also indicated that he had visited with Mr. Gaither and kept up constant correspondence with him.

The investigating police officer and the Metropolitan Police Department, the former through telephone calls to Mr. Gaither's home and the latter by a trip to the apartment, were unable to reach Mr. Gaither until 3:30 a.m., some four hours after the accident. Mr. Gaither testified that he was not hard of hearing and normally had no trouble hearing the telephone ring. Mr. Gaither denied making the statement attributed to him by the investigating officer concerning Mr. Gaither's leaving the keys in the tailgate.

Both Mr. Gaither and Mr. Hendricks testified that there was nothing in the rear of the stationwagon at the time they went to reclaim it on the day after the accident. There had been tools and briefcases in it the evening of the 22nd when it was parked. The officer testified that there was a property release signed by Mr. Gaither for a briefcase and certain personal belongings that were returned to him and that he further recalls seeing the equipment, tools and garden implements in the stationwagon.

Apparently anticipating the question of the property release, Mr. Gaither attempted to explain it away, but in so doing, added an element that darkened the cloud on his credibility.

> "Q: Did you have any conversation with the police when you went to pick up your car?
>
> A: Yes, I did. I went there first, I believe, and he told me where I could find the car. There was a little briefcase there and he asked me whether it was my briefcase. I said it was. *Whether or not I signed a receipt for it, I don't remember,* but anyhow, it was a briefcase in which I carry prices and catalogues. It was a little brown one.

Q: Was this in addition to the other briefcase?

A: I have one, in which I carry current records, checks and that type of thing. It is what you are using, the expensive type, like the one you are working on there. The other one was a brown one, a cheaper type, which was returned to me. I used it in estimating, but not in executing the job." (JA 13, 14) (Emphasis supplied)

This testimony preceded that of Officer Rash, who testified that a property release was signed by Mr. Gaither but that the briefcase he returned did contain the checkbooks and personal papers, rather than one containing prices and catalogues.

There was established through cross-examination that Mr. Hendricks, and erstwhile employee and present friend of Mr. Gaither's, did not know what day of the week June 22nd was, nor what program he watched, nor any specific details other than the fact that he was supposedly there between the hours of 10:00 and 11:30 p.m. on the evening in question.

It was upon such testimony, only part of which has been set forth, that the Trial Court ruled that testimony as to the whereabouts and activities of Mr. Gaither was "uncontradicted". In *Farrall* v. *Ellis,* 157 A. 2d 127 (1960), it was stated that "Uncontradicted proof requires evidence which destroys all inferences and presumptions supporting one party and which raises no doubts against the other party."

The appellant attempts to distinguish this case by supplying the adjectives "minor" and "explainable" to any inconsistencies. This attempt falls short, since it is *not* his determination to make as to what is minor or not; moreover, the inconsistencies or contradictions were not explained.

The appellant seems to argue further that there was not any inconsistent version as to what happened. In this

connection, he attempts to distinguish the case of *Hiscox* v. *Jackson,* 75 U.S. App. D.C. 293. In that case, which dealt with the question of ownership and agency of the operator, it was held that a defendant's proof may be contradicted by his own evidence. In a concurring statement, Judge Stevens commented that where there was testimony of an owner that he did not consent to the use of his car by the person driving it at the time of the accident and that this is uncontradicted, there is still the proposition that the credibility and dependability of this testimony—even uncontradicted (as distinguished from undisputed) testimony —is for the jury.

An essential element of the acceptance or rejection of testimony is the credibility of the witnesses. The cases holding that the issue of credibility is for the jury are legion.

The appellant cites *Grier* v. *Rosenburg,* 213 Md. 248, 131 A. 2d 737 (1957), as a case holding that when the presumption is rebutted by denial of the owner, the burden of proceeding with the evidence shifts to the plaintiff. The Court held, in fact, that the evidence adduced from the owner in that case *did not rebut* the presumption that the automobile was being operated by the owner or one of his employees acting within the scope of his employment. It also reiterated the presumption that exists in Maryland, that the driver of an automobile is the agent, servant and/or employee of the owner thereof. (See Page 739, paragraph 1 and 2.)

The District of Columbia Court of Appeals was eminently correct and supported by well established principles of law in holding that the Trial Court erred in directing a verdict. Even in the dissenting opinion, there is an indication that at this point, the Court was in full agreement. Accordingly, the appellees are entitled to a new trial on this point, if for no other.

II

From the appellees' standpoint, there was sufficient authority under Maryland law to support the District of Columbia Court of Appeals decision, regardless of its position in applying Title 40, Section 424 of the District of Columbia Code (1961 Edition). It is significant to note that in the case of *Knight* v. *Handley Motor Company, Inc.*, 198 A. 2d, 747 (1964) quoted by the appellant in his attack upon the decision that the Court stated, "Were satisfied that even under Section 40-424, D. C. Code (1961) Bell's (operator of the vehicle) presumptive agency was clearly rebutted by the evidence." Page 750, footnote 3.

III

It is only when we have reached the second alternative, theory of liability, that we become embroiled in grammatical gymnastics. This theory of liability is predicated upon the negligence of leaving the keys to one's automobile in an unattended motor vehicle. The person that the appellees are attempting to hold responsible under this theory is again, Mr. Gaither. This is not predicated upon his negligent operation of his vehicle, but of his negligent act in making the keys to his automobile accessible.

Certain legal commentators construe the applicable law under the traditional doctrine of lex delicti to mean the place where the last act of the wrongdoer that was necessary for the injury to occur took place. 53 *Corpus Juris Secundum* 15. If the injury that did occur had occurred within the boundaries of the District of Columbia, we would have had no problem because, once again, the act and the injury would have taken place within the same jurisdiction.

Here a slight digression is perhaps in order. Before the person negligently leaving his keys can be found responsible for any injury occurring as a result of a collision of

his vehicle, the person taking the vehicle would had to have been negligent. Consider if you will that the thief is exercising due care and the eventual palintiff runs a red light. No negligence exists on the part of the thief; and although there was still an act by the owner that could be deemed negligent, no liability attaches.

The theory of holding liable the owner, who negligently leaves his key in his automobile, usually breaks down not on the question of the breach of duty, but upon the question of proximate cause. This court in an opinion filed February 6, 1968 dealt with this question and stated that the issue of proximate cause was a question for the jury irrespective of the intervening negligence of a thief. *Colonial Parking Inc.* v. *John J. Morley* No. 21,002.

When one speaks of a negligent act, there is the tacit assumption that there is an actor. When we deal with the question of someone leaving the keys in his vehicle, a thief then stealing the car, using these keys, and a subsequent automobile accident due to the negligence of the thief, we are talking about two acts of negligence and two actors. What is all too frequently overlooked, usually due to the financial irresponsibility of the thief, is that the thief is *also* liable for his negligence and we thus have *two* acts and two individuals who could be held liable, each for their respective acts.

It was, and is the appellees contention, under the second alternative theory of liability that Mr. Gaither committed his negligent act within the *District of Columbia* and under those circumstances he should be judged by the District of Columbia law. *Moore* v. *Pywell,* 29 App. D.C. 312 (1907). This particular question is one that requires no further consideration than the opinion of this court in *Boland* v. *Love,* 95 U.S. App., D.C. 337, 222 F. 2d 27. This Court in that case applied the District of Columbia law in determining the standard of conduct to be weighed in determining negligence even though the accident had occurred in

Virginia. This case also was a situation in which the keys became available in the District of Columbia and was a question of whether or not such availability was due to negligence. Thus under this theory, the trial court should not have directed a verdict or refused to consider the District of Columbia law.

IV

The Trial Court refused to admit D. C. Traffic Regulation 98, when offered. The Trial Court held that this regulation required *only* the removal of the keys from the ignition and not from the car. This ruling was not only a syntactical error, but contrary to the case law construing the intent and purpose of this regulation. There can be no question that the acts of anyone in leaving the keys in an unattended motor vehicle on the public streets in the District of Columbia are governed by the traffic regulations of the District of Columbia.

This regulation through its grammatical construction indicates that the removal of the keys should be from the car rather than simply from the ignition. The phrasing of the regulation in pertinent part states:

> " . . . charge of a motor vehicle shall permit *it* to stand unattended without first stopping the engine, locking the ignition, removing the key, and effectively setting the brake thereon . . . "

It obviously refers back to motor vehicle. The phrases that follow seriatim refer back to the motor vehicle, because obviously the engine is part of the motor vehicle, the ignition is part of the motor vehicle, and the brake is part of the motor vehicle. To contend that removal of the key refers only to removing it from the ignition is grammatically incorrect. The best that can be said of this particular phrase is that it is what is known as a "squinting modifier". This would perhaps allow it to refer back to the ignition, but would be incongruous in doing so when compared with

the other phrases used to modify the motor vehicle. The presence of the comma helps indicate what the framers of this regulation had in mind. (There is no legislative history as such for this particular phrase, and it appears rather uniformly throughout the country, including in the state of Maryland.)

This particular question while not directly enunciated was certainly disposed of by the landmark decision in this area; namely, *Ross* v. *Hartman,* 78 U.S. App. D.C. 217. The Court in its rationale in discussing the regulation, which was at that time identified as Section 58 of D. C. Traffic Regulations (1943), discussed not a question of a locked ignition, but a locked car. To further reinforce the the appellees' position that the Court was speaking about locking the vehicle rather than simply the ignition, the appellees respectfully refer this Court to the citation in that case of *Maloney* v. *Kaplan,* 233 N.Y. 426, 135 N.E. 838 in which the New York Court of Appeals discusses an imporperly secured motor vehicle.

Ross v. *Hartman, (supra)* and *Schaff* v. *R. W. Claxton, Inc.,* 79 U.S. App. D.C. 207 established that this regulation was enacted for public safety. Obviously, the hazard of the stolen car is not removed by taking the key from the ignition switch and then permitting the key to be left in the door or tailgate in plain sight. To what effect would be the regulation if the ignition was locked and the key, while removed from the ignition was still made readily available so that the ignition could be unlocked. If the key were removed from the *car,* then the rest of the regulation could be given effect. Both grammatically and by legal intendment, Section 98 requires the removal of the key from the motor vehicle and not simply from the ignition. Accordingly, this regulation should have been admitted and under the controlling case law mentioned above, a violation of this regulation would have been negligence.

There was evidence to support the admission of the regulation having once overcome the Judge's incorrect analysis as to its requirements and the Court is respectfully referred to the earlier questioning as to the keys. In fact, all the testimony given, even construed in a light most favorable to Mr. Gaither, places these keys in the tailgate or at least in the automobile which is where the keys subsequently were found. Regardless of the degree of the evidence, the Judge was incorrect in not allowing the jury to determine how the keys came to be in the automobile. Accordingly, the District of Columbia Court of Appeals was correct in reversing on this ground.

V

The appellees contend that at this point, there was ample ground for the District of Columbia Court of Appeals to overturn the Trial Court's action. Appellant contends that the Court of Appeals below was in error in applying the District of Columbia law through a deviation from the traditional position of *Lex Delicti* with such deviation being explained or justified under the conflicts of laws rule, "Grouping of Contacts Theory". This Court has used the contacts theory in past cases. *Tramontana* v. *S. A. Empresa de Viacio Aerea Rio Grandense,* 121 U.S. App. D.C. 338, 350 F. 2d 468 (1965) and *Williams* v. *Rawlings Truck Line, Inc.,* 123 U.S. App. D.C. 121, 357 F. 2d 581 (1965). The appellant attempts to distinguish these cases, but does not successfully do so. Since there is precedence in this jurisdiction for the adoption of this new conflicts rule, the only legitimate argument that could be raised is whether or not it was appropriately applied.

While it is true that the accident occurred in Maryland and a Maryland resident suffered the damage, one must remain cognizant of the fact that this still occurred within the Greater Metropolitan Washington Area. The District of Columbia, situated between two states and encompassing

a rather small geographical area, has contacts and interests that do not terminate at a geographical boundary. The coin, as it were, has two sides and appellant should note that Mr. Gaither was a District resident with a District license plate and thus operating his motor vehicle more frequently within the District of Columbia. Ergo the District of Columbia had more of an interest in the conduct of Mr. Gaither than did Maryland, particularly in view of the fact that one of the acts complained of—the leaving of the keys in the automobile—was a violation of its traffic regulation. So, if this Court feels that the grouping of contacts theory was a proper theory to use, it is argued that it was properly applied.

The appellees did not urge the grouping of contacts theory below and it is felt that they are entitled to a reversal of the Trial Court's decision without necessarily reaching that question. Counsel has reviewed the several law review articles written in connection with the progenitor of the contacts approach to conflicts of laws; *Babcock* v. *Jackson,* 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191, N.E. 2d 279, 95 A.L.R. 2d 1 (1963). It was with proper respect, but bemusement that the various interpretations were scanned. (See "Comments on *Babcock* v. *Jackson,* A Recent Development in Conflict of Laws", 63 *Colum.L. Rev.* 12 (1963), "Note: The Impact of *Babcock* v. *Jackson* on Conflict of Laws", 52 *Va.L.Rev.* 302 (1966); Note, 77 *Harv.L.Rev.* 355 (1963); and authorities therein cited.)

The appellees contend that the matter can be resolved by interpretation of *Lex Delicti* and it is felt that this was done in the case of *Boland* v. *Love (Supra).*

> "We should have a great many fewer disputes in the world if words were taken for what they are, the signs of our ideas only, and not for things themselves."
>
> *Locke*—"Essay on the Human Understanding"

CONCLUSION

It is respectfully submitted that the District of Columbia Court of Appeals had ample grounds for reversing the Trial Court and accordingly, this court, even if it modifies the ruling of the Court of Appeals below, should allow the holding of reversal and remand for a new trial to stand.

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